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No. 15580

United States
Court of Appeals
for the Ninth Circuit

E. S. McKENDRY, FLORENCE LOWE
BARNES, also known as Pancho Barnes and
WILLIAM EMMERT BARNES,
Appellants,
vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record
In Two Volumes
VOLUME I.
(Pages 1 to 308, inclusive)

Appeal from the United States District Court for
the Southern District of California,
Northern Division

FILED

OCT 15 1957

PAUL P. O'BRIEN, CLERK

No. 15580

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Los Angeles 13, California.

For Appellee:

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Assistant United States Attorney General,

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney,

JOSEPH F. McPHERSON,
ALBERT N. MINTON,
Assistant United States Attorneys,
821 Federal Building,
Los Angeles 12, California. [1]

* Page numbers appearing at bottom of page of original Transcript of Record.

In the United States District Court, Southern
District of California, Northern Division

No. 1253 ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

360 ACRES OF LAND IN THE COUNTY OF
KERN, State of California; E. S. McKEN-
DRY; FLORENCE LOWE BARNES, also
known as FLORENCE LOWE BARNES Mc-
KENDRY; WILLIAM EMMERT BARNES;
BENJAMIN C. HANNAM; KATHRYN
MAY HANNAM; FLORENCE LOWE
BARNES, doing business as PANCHO'S
RANCHO ORO VERDE; DESERT AERO,
INC.; LAYNE & BOWLER CORPORA-
TION, a corporation; FARMERS AND MER-
CHANTS TRUST COMPANY OF LONG
BEACH, a corporation; FARMERS AND
MERCHANTS BANK OF LONG BEACH,
a corporation; COUNTY OF KERN, a body
politic and corporate; STATE OF CALIFOR-
NIA, a corporation sovereign and UNKNOWN
OWNERS, Defendants.

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of the Assistant Secretary of the Air Force of the United States, for the taking of property under the power of eminent domain and for the ascertainment and

award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the [2] further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C., Sec. 257); and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C., 1343a, b, and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 28, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress); and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes.

3. The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for expanding needs and requirements for the Department of the Air Force and other military uses incident thereto.

4. The estate taken for said public uses is the fee simple title, subject, however, to existing ease-

ments for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is situate in the County of Kern, State of California, and, for convenience, is segregated into separate tracts designated by separate tract numbers and is more particularly described as follows:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management. [3]

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2071: Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the offi-

cial plat of the survey of said land on file in the Bureau of Land Management.

6. The names of the apparent and presumptive owners of the said land are set out after each tract number as follows:

Tract L-2040: E. S. McKendry; Florence Lowe Barnes McKendry; Desert Aero, Inc. and Layne & Bowler Corporation.

Tract L-2043: William Emmert Barnes; Florence Lowe Barnes McKendry; Desert Aero, Inc. and Layne & Bowler Corporation.

Tract L-2071: Benjamin C. Hannam and Kathryn May Hannam; E. S. McKendry, also known as E. S. McKendry, and Florence Lowe Barnes McKendry. [4]

Tract L-2072: E. S. McKendry; Florence Lowe Barnes McKendry; Desert Aero, Inc. and Layne & Bowler Corporation.

7. The State of California and the County of Kern may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named there are or may be others who have or may claim to have some interest in the property to be taken, whose names are unknown to plaintiff and such persons are made parties to this action under the designation "Unknown Owners".

Wherefore, plaintiff demands judgment that the

property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Dated: February 27, 1953.

WALTER S. BINNS,
United States Attorney,
A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice,
/s/ By A. WEYMANN,
Attorneys for Plaintiff.

Demand for Jury Trial

Trial by jury of the issues of just compensation is demanded by plaintiff.

Dated: February 27, 1953.

WALTER S. BINNS,
United States Attorney,
A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice,
/s/ By A. WEYMANN,
Attorneys for Plaintiff. [5]

[Endorsed]: Filed February 27, 1953.

[Title of District Court and Cause No. 1253-ND.]

DECLARATION OF TAKING

To the Honorable the United States District Court:
I, the undersigned, Edwin V. Huggins, Assistant

Secretary of the Air Force of the United States of America, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which [6] Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress), which act authorizes acquisition of the land, and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for expanding needs and requirements for the Department of the Air Force and other military uses incident thereto. The lands have been selected under the direction of the Sec-

retary of the Air Force for acquisition by the United States for use in connection with Edwards Air Force Base, Kern County, State of California, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the lands being taken is set forth in Schedule "A", attached hereto and made a part hereof, and is a description of part of the lands described in the Complaint in Condemnation filed in the above-entitled cause.

3. The estate taken for said public uses is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said lands, with all buildings and improvements thereon and all appurtenances thereto and including any and all interest hereby taken in said lands is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said lands probably will be within any limits prescribed by law on the price to be paid therefor. [7]

In witness whereof, the undersigned, the Assistant Secretary of the Air Force, hereunto subscribes

his name by direction of the Secretary of the Air Force, this 3rd day of February, 1953, in the City of Washington, District of Columbia.

/s/ E. V. HUGGINS,
Assistant Secretary of the
Air Force. [8]

SCHEDULE "A"

The land which is the subject matter of this Declaration of Taking aggregates 360.00 acres, more or less, situate and being in the County of Kern, State of California. A description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Tract L-2040: The West half ($W\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$); the Northeast quarter ($NE\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$); the West half ($W\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 140.00 acres, more or less.

Names and Addresses of Purported Owners:
E. S. McKendry, Box 37, Edwards, Calif. Florence
Lowe Barnes McKendry, Box 37, Edwards, Calif.
Desert Aero, Inc., c/o Bertrand Rhine, 729 Citizens

National Bank Building, Los Angeles, Calif. Layne and Bowler Corp., a California corporation, address unknown.

Estimated Compensation: Thirty-Three Thousand Five Hundred Dollars (\$33,500.00).

Tract L-2043: The West half ($W\frac{1}{2}$) of the Northeast quarter ($NE\frac{1}{4}$); the East half ($E\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 100.00 acres, more or less. [9]

Names and Addresses of Purported Owners: William Emmert Barnes, Box 37, Edwards, Calif. Florence Lowe Barnes McKendry, Box 37, Edwards, Calif. Desert Aero, Inc., c/o Bertrand Rhine, 729 Citizens National Bank Building, Los Angeles, Calif. Layne & Bowler, Box 8225, Market Station, Los Angeles, Calif.

Estimated Compensation: Twenty-Nine Thousand Dollars (\$29,000.00).

Tract L-2071: The Northwest quarter ($NW\frac{1}{4}$) of the Southwest quarter ($SW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 40 acres, more or less.

Names and Addresses of Purported Owners: Benjamin C. Hannam and Kathryn May Hannam, address unknown. E. S. McKendry, also known as E. S. McKenndry, Box 37, Edwards, Calif. Florence Lowe Barnes McKendry, Box 37, Edwards, Calif.

Estimated Compensation: Two Thousand Dollars (\$2,000.00).

Tract L-2072: The East half ($E\frac{1}{2}$) of the North-east quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 80.00 acres, more or less. [10]

Names and Addresses of Purported Owners: E. S. McKendry, Box 37, Edwards, Calif. Florence Lowe Barnes McKendry, Box 37, Edwards, Calif. Desert Aero, Inc., c/o Bertrand Rhine, 729 Citizens National Bank Building, Los Angeles, Calif. Layne & Bowler, Box 8225, Market Station, Los Angeles, Calif.

Estimated Compensation: One Hundred Forty Thousand Five Hundred Dollars (\$140,500.00).

The gross sum estimated to be the just compensation for the estates in the lands hereby taken is Two Hundred Five Thousand Dollars (\$205,000.00).

Schedule B—Acquisition Map attached. [12]

[Endorsed]: Filed February 27, 1953.

[Title of District Court and Cause No. 1253-ND.]

DECREE ON DECLARATION OF TAKING

There having been filed and presented to the Court by plaintiff, United States of America, a Declaration of Taking in which the fee simple title in and to the real property hereinafter described, was vested in plaintiff, and good cause appearing therefor, the Court Finds and Decrees as follows:

1. That plaintiff, United States of America, is entitled to acquire the property by eminent domain for use in connection with the Edwards Air Force Base, California, and for such other uses as may be authorized by Congress or by Executive Order.

2. That a Complaint in Condemnation was filed herein at the request of the Assistant Secretary of the Air Force, the authority empowered by law to acquire the land described in said Complaint, and under the direction of the Attorney General of the United States.

3. That in said Complaint in Condemnation and in the Declaration of Taking is a statement showing the authority under which this [13] proceeding was brought and a statement as to the public uses for which said land is being taken and the Assistant Secretary of the Air Force is the person duly authorized and empowered by law to acquire the said land and the Attorney General of the United States is the person authorized by law to direct the institution of this condemnation proceeding.

4. That a statement of the estate or interest in said land is also shown in said Declaration of Taking, and drawings showing the land taken are attached to and made a part of said Declaration of Taking.

5. That a statement of the amount of money estimated by the Assistant Secretary of the Air Force to be just compensation for the taking of said land, namely, the sum of \$205,000, is shown by said Declaration of Taking, which sum has been deposited into the registry of this Court.

6. That in said Declaration of Taking is a statement to the effect that the estimated ultimate award of damages for the taking of said property, in the opinion of the Assistant Secretary of the Air Force probably will be within any limits prescribed by Congress as the price to be paid therefor and the Court having fully considered the Complaint in Condemnation and the Declaration of Taking and the statutes made and provided, is of the opinion that plaintiff, United States of America, is entitled to the full fee simple title to the estate hereby taken for the public uses in the land hereinafter described, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines.

7. That the said title is being acquired pursuant to and under the authority of the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress

approved August 1, 1888 (25 Stat. 357; 40 U.S.C., Sec. 257); and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C., Sec. 171), which acts [14] authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C., 1343a, b and c), which act authorizes the acquisition of land for air corps stations and depots; the National Security Act of 1947, approved July 26, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress); and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress) which act appropriated funds for such purposes; and acts amendatory thereof or supplementary thereto.

It Is Therefore Ordered, Adjudged and Decreed:

I.

That there is hereby vested in plaintiff, United States of America, the full fee simple title to the estate herein taken for the public uses in the lands hereinafter described, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

II.

That the land taken and condemned in and by this proceeding is situate in the County of Kern, State of California, and is more particularly described as follows:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 20 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, [15] Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2071: Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

III.

That nothing herein is to be considered as a determination by the Court that the estimate of the Assistant Secretary of the Air Force of the United States of the amount now on deposit, is or is not just compensation for the taking of the said land by plaintiff.

IV.

The Court reserves jurisdiction to enter such further orders and decrees as may be necessary and proper in the premises.

Dated: March 2, 1953.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by: Walter S. Binns, United States Attorney, A. Weymann, Special Attorney, Lands Division, Department of Justice, by A. Weymann, Attorneys for Plaintiff. [16]

Judgment Docketed and Entered March 2, 1953.
[Endorsed]: Filed March 2, 1953.

[Title of District Court and Cause No. 1253-ND.]

NOTICE OF MOTION TO SET ASIDE DECLARATION OF TAKING AND TO VACATE AND SET ASIDE EX PARTE JUDGMENT

To the Plaintiff's Attorneys, Laughlin E. Waters and A. Weymann:

You Will Please Take Notice that on Monday, September 21, 1953, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as the matter can be heard, in the United States Courtroom, U. S. Post Office & Court House, Fresno, California, the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, will present the within Motion to Set Aside Declaration of Tak-

ing and to Vacate and Set Aside Ex Parte Judgment.

Dated at Los Angeles, California, this 5th day of September, 1953.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona.

[Title of District Court and Cause No. 1253-ND.]

MOTION TO SET ASIDE THE DECLARATION OF TAKING DATED FEBRUARY 27, 1953, AND TO VACATE AND SET ASIDE THE EX PARTE JUDGMENT ENTERED THEREON, DATED MARCH 2, 1953

Come now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court set aside the Declaration of Taking dated February 27, 1953, and to vacate and set aside the ex parte judgment entered thereon, dated March 2, 1953, for the following reasons:

I. That the estimate of "just compensation" was not arrived at in good faith and that the declaration and deposit did not comply with the requirements of the statute pertaining thereto.

II. That the Government wilfully and knowingly and deliberately acting in bad faith committed an arbitrary act against the defendants when the Government estimated and deposited a mere nominal

sum and were guilty of noncompliance with statutory requirements.

This Motion will be based upon the "Declaration of Taking" on file and the "Decree on the Declaration of Taking"; on [18] testimony at the time of hearing; affidavits making a prima facie showing of noncompliance with the statute; exhibits proving bad faith in the manner of appraisal of the lands and buildings; and other and sundry documents in support of the Motion.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona.

[Endorsed]: Filed September 5, 1953.

[Title of District Court and Cause No. 1253-ND.]

NOTICE OF MOTION TO DISMISS

To the Plaintiff's Attorneys, Laughlin E. Waters
and A. Weymann:

You Will Please Take Notice that on Monday, September 21, 1953, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as the matter can be heard, in the United States Courtroom, U. S. Post Office & Court House, Fresno, California, the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, will present the within Motion to Dismiss.

Dated at Los Angeles, California, this 5th day of September, 1953.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona.

[Title of District Court and Cause No. 1253-ND.]

MOTION TO DISMISS

Come now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court that the Complaint on file herein be dismissed for the following reasons:

I. Improper and illegal initiation of the Condemnation Suit.

II. The Statutes are not explicit and lack express legislative power as to the defendants' lands.

III. The Petition is instituted in bad faith and with spiteful and malicious intent and the acquiring agency acted arbitrarily, capriciously, not in compliance with the Statutes and with fraudulent intent, abuse of discretion, and the defendants are informed and believe that there has been misappropriation of the appropriation for Muroc Air Force Base as set forth in Public Law 564, approved June 17, 1950.

This Motion will be based upon the pleadings on file in the within action and upon the Memorandum of Points and Authorities and on such documents,

affidavits, witnesses and arguments as [21] offered in support of the motion.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona.

[Endorsed]: Filed September 5, 1953.

[Title of District Court and Cause No. 1253-ND.]

SUPPLEMENTAL AMENDMENT TO MOTION
TO SET ASIDE DECLARATION OF TAK-
ING AND TO VACATE AND SET ASIDE
EX PARTE JUDGMENT

Come now the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, and by way of amendment to their Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment heretofore served and filed in these proceedings, move this Honorable Court that the Declaration of Taking on file herein be set aside and that the ex parte judgment on file herein be vacated and that other orders and decrees in said proceedings subsequent to the filing of said Declaration of Taking be vacated and set aside for the following reasons:

1. That these proceedings are in violation of the United States Constitution and particularly the Fifth and Fourteenth Amendments thereof.

2. That the United States has not been author-

ized by any Act of Congress to acquire the lands of these moving defendants through these condemnation proceedings.

3. That this proceeding was commenced and has been prosecuted in bad faith and with express malice toward these defendants and each of them [35] and particularly toward defendant Pancho Barnes, and that such express maliciousness was held by the Secretary of the Air Force, the Assistant Secretary of the Air Force and the acquiring agency of the land taken under the declaration of taking and the decree rendered thereon.

That Bernard Evans, acting in bad faith and actual malice, did make the only appraisal of the defendants' property and did not use that degree of skill necessarily required by one of his profession and acting in his capacity. He refused to take time to look at much of the ranch and the many installations thereon. He was slipshod and hurried in his methods. He consumed approximately 11 hours total time in appraisal work on the premises. (One appraiser of the defendants required 13 days on the property to cover its assets.) There was malevolent intent on the part of Bernard Evans in his recommendation to the acquiring authorities and thus to the Secretary of the Air Force. The Assistant Secretary of the Air Force, one Edwin V. Huggins did on the 3rd day of February, 1953, sign a Declaration of Taking with a Schedule "A" attached thereto, which included the sum set as estimated just compensation at \$205,000. The Declaration of

Taking filed on February 27, 1953, was followed by a Decree on Declaration signed by Judge Yankwich which was stamped "Judgment docketed and entered March 2, 1953". Subsequently a "temporary injunction" against the defendants was signed by Judge Yankwich which constitutes a further "taking". The information put before Judge Yankwich by way of affidavits and testimony was made in bad faith and with intense malevolent intent by Colonel Akers and Colonel Sacks and other Air Force personnel not for the reason as stated but to hamper and interfere with the defendants' business and in furtherance of other actions to hamper and interfere with the defendants' business.

The Fifth Amendment to the Constitution of the United States states "Nor shall private property be taken for public use without just compensation". There is a strong prima facie case that the amendment has been abused and nullified in this case of United States vs. 360 Acres of Land and a showing of deliberate bad faith in the appraisal and/or recommendation in so much as the United States Government did pay the sum of \$593,500.00 [36] for 240 acres of undeveloped desert land as shown in the deed made to them by Macco Corporation recorded May 12, 1953, at the Kern County Recorder's Office (Pancho Barnes' Exhibit No. 10 for identification). This land is adjacent to and approximately $\frac{3}{4}$ of a mile from the defendants' property but badly located and not even on a road. This property is absolutely unimproved vacant desert land and without water. The defendants' 360

acres of land is highly improved, located on a main highway, has 5 wells (one of which is sufficient to the needs of the property), approximately 40,000 square feet (at the time of condemnation) of buildings. (Reasonable replacement for buildings alone value about \$400,000.00). Approximately 100 acres under irrigation, highly improved airport, stock corrals, fences and cross fences. One of the finest rodeo grounds in the United States and two race tracks, landscaping, etc. The \$205,000 estimated as "just compensation" is not sufficient money to allow the defendants to remove themselves from the premises let alone of reestablishing themselves to permit a reentering of their same business.

The defendants have been subjected to the most virulent discrimination by the United States Government when it willingly negotiates a settlement of \$593,500.00 with Macco Corporation for 240 acres vacant desert land adjacent to the defendants' property and condemns defendants' land of 360 acres of highly developed and productive land for only \$205,000.

In his signing of the Declaration of Taking the Assistant Secretary of the Air Force relied and acted on the fraudulent, malevolent, unjust and incorrect recommendation of his agents. The defendants have information and belief that the present Secretary of the Air Force, Harold Talbot, has full knowledge of the proceedings of this case and that by his acquiescence in the matter consciously and deliberately perpetuates the bad faith, malevolence

and arbitrary actions upon which this entire case is predicated..

The defendants requested a salvage value on their property, as is customary in other land acquisitions in the vicinity. Colonel Shuler of the United States Corps of Engineers told the defendants that the appraisal of their property was not sufficiently complete to be able to give them a [37] salvage value. The defendants have a letter dated 3 September, 1953 from Colonel Frye presently District Engineer stating that "the appraisal made on your property did not contain a salvage value on the improvements, and no salvage value has been arrived at since. Therefore, at this time, as in the original offer, this office can give you no salvage figure."

A subpoena duces tecum was served upon J. L. Maritzen to produce in court on October 27, 1953, the appraisal made by the appraiser, Mr. Bernard Evans, who was employed by the United States Corps of Engineers to appraise defendants' property. The appraisal is available to Mr. Maritzen. A Motion to Quash by the plaintiff is still before the Court. In a recent decision by Judge William Mathes it was held that "government confidential files are not necessarily privileged", that a defendant in a condemnation proceeding was entitled to see the appraisal. As the government has refused to proffer the appraisal data the following holds true: Cal. C.C.P. 1963 Sub-section 5. "Evidence wilfully suppressed would be adverse if produced."

That in furtherance of such bad faith and actual malice, as aforesaid, the parties heretofore named and described and the acquiring agency acted and have continued to act arbitrarily and capriciously with express intention of and in the exercise of abusive discretion and contrary to the law and statutes in force and effect.

4. That plaintiff by these proceedings has not intended and does not intend in good faith to acquire the use of the lands belonging to these defendants for any lawful purpose of the United States but, to the contrary, are using these proceedings as a method of evicting these defendants and preventing them from carrying on in said premises.

Said motion will be based upon the pleadings on file, the evidence heretofore introduced to the court in support of the original motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment, the memorandum of points and authorities heretofore submitted, and oral argument to be made in behalf of the defendants pursuant to the order of this court. [38]

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES.

[Endorsed] Filed February 23, 1954.

[Title of District Court and Cause No. 1253-ND.]

SUPPLEMENTAL AMENDMENT TO MOTION
TO DISMISS

Come now the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, and by way of amendment to their Motion to Dismiss heretofore served and filed in these proceedings, move this Honorable Court that the complaint on file herein be dismissed and that all other orders and decrees in said proceedings subsequent to the filing of said complaint be vacated and set aside for the following reasons:

1. That these proceedings are in violation of the United States Constitution and particularly the Fifth and Fourteenth Amendments thereof.

2. That the United States has not been authorized by any Act of Congress to acquire the lands of these moving defendants through these condemnation proceedings.

3. That this proceeding was commenced and has been prosecuted in bad faith and with express malice toward these defendants and each of them and particularly toward defendant Pancho Barnes, and that such express maliciousness was held by the Secretary of the Air Force, the Assistant Secretary of the Air Force and others whose misrepresentations previous [45] to the filing of condemnation were relied upon and adopted by the Secretary of the Air Force and the Assistant Secretary of the Air Force. Colonel Maxwell and Colonel Gilkey

both acted in bad faith and with malicious intent to harm defendant Pancho Barnes and so informed her of their intentions. Their actions and recommendations resulted in the Secretary of the Air Force and the Assistant Secretary of the Air Force acting according to their recommendations. Colonel Gilkey informed the defendants Pancho Barnes and E. S. McKendry that he had changed the entire plans of the air base with the sole purpose of getting rid of them, which statement was so borne out by the changing of the master plan and by subsequent action that it is logical to assume that the Secretary and the Assistant Secretary of the Air Force acted upon his recommendation which recommendation was made in bad faith. The making of biased and malevolent recommendations through channels to the Secretary of the Air Force was done in an attempt to harm the defendants as distinguished from serving the government and the taxpayers of the country.

That in furtherance of such bad faith and actual malice, as aforesaid, the parties heretofore named and described and the acquiring agency acted and have continued to act arbitrarily and capriciously with express intention of and in the exercise of abusive discretion and contrary to the law and statutes in force and effect.

4. That plaintiff by these proceedings has not intended and does not intend in good faith to acquire the use of the lands belonging to these defendants for any lawful purpose of the United

States but, to the contrary, are using these proceedings as a method of evicting these defendants and preventing them from carrying on and occupying lawful businesses which they are carrying on in said premises.

Said motion will be based upon the pleadings on file, the evidence heretofore introduced to the court in support of the original motion to dismiss, the memorandum of points and authorities heretofore submitted, and oral argument to be made in behalf of the defendants pursuant to the order of this court. [46]

/s/ PANCHO BARNES,
/s/ E. S. McKENDRY,
/s/ WILLIAM EMMERT BARNES,
Defendants in Propria Persona.

[Endorsed]: Filed February 23, 1954.

[Title of District Court and Cause No. 1253-ND.]

MEMORANDUM OF OPINION AND ORDERS

The government deposited with the Clerk of the Court the sum of \$205,000 as estimated compensation for the taking of the property in question, which is situated in the vicinity of Edwards Air Base in Kern County, California. After the deposit was made these defendants requested, and were granted, the withdrawal of \$194,000. It is clear that the acceptance of such amount constitutes a waiver of objections to the taking.

Defendants' motion to dismiss the action is denied.

Defendants' motion to set aside the declaration of taking is denied.

The government's motion for possession is granted upon the terms hereinafter set forth.

The chief problem of the court is to fix a time at which the government shall take possession of the premises. The government contends that it is faced with a dangerous situation in that the property is in the zone of accidents from high-speed planes which are in training there. The defendants have claimed that there is very little likelihood of such immediate danger; that it would be unfair to dispossess them of the property as the situation now exists and is likely to be for an extended time [49] in the future.

On October 28, 1953, at page 184 of the transcript beginning at line 23, Colonel Akers, Chief of Staff, was a witness on re-direct examination. The following there appears:

“The Court: And where is the work being done now, on this map?

The Witness: You mean the construction work?

The Court: Yes, whatever work is being done for the purpose of completing this runway and this system that you have in mind. Where is the work being done now?

The Witness: The construction work in general

is being done in this area (indicating) on the runway. Around up here on the taxi-way ramp area; and the building area, roads and so forth, up here (indicating), there is construction work.

The Court: And how far would that be from Miss Barnes' property?

The Witness: Offhand, I would estimate it would be in the neighborhood of three miles, statute.

The Court: Now, is there any degree of reasonable likelihood that with the work being done here (indicating), three miles away from her property, that her property or anyone there would be injured?

The Witness: Yes, sir. The likelihood exists, because the aircraft are flying over this area every day."

* * * * *

"The Witness: I am not sure, your Honor, but let me answer it this way: The work with respect to constructing the runway itself, that is, the [50] building of runways or buildings, that is not the work that endangers her property or anyone else's property.

The Court: That is what I want to know.

The Witness: It is the flying of aircraft, the testing of aircraft.

The Court: What I want to find out is the necessity for the immediate possession of the property; and I am trying to determine whether there is any likelihood that there would be injury resulting if it isn't ordered now, or whether it should be ordered at a later time.

The Witness: That is a difficult question to an-

swer, your Honor. I think we went into something like that before.

Naturally we do not want accidents to happen, but our mission, our job, is to test these new airplanes and find out what is wrong with them. In the course of testing, the accidents do occur, may occur at any time in flight, take-off or landing. It may be over the property or somewhere else.

There is that danger of accidents happening at any time, on the property or anywhere else.

The Court: Let me say that I am now referring to Exhibit No. 4 and Enclosure No. 3. Here is the runway, in a northeasterly direction, from B to A.

The Witness: That is the runway being built.

The Court: Being built?

The Witness: That is not the runway in use at the present time.

The Court: Where is the one in use?

The Witness: This one right here (indicating), [51] your Honor, indicated by the dark line.

The Court: This one from B to A is the one being built for future use?

The Witness: That is correct, sir.

The Court: Has there been any work done on that runway yet?

The Witness: Yes, sir. The work on that runway is, I would say, approximately 20 to 25 per cent completed.

The Court: What is the distance between the yellow of Miss Barnes' property and the southwesterly place marked 'B' of the runway which is being now worked on?

The Witness: I would judge it to be in the neighborhood of two or three miles, your Honor.

The Court: When do you expect to do work from 'B' to Miss Barnes' property?

The Witness: Would you mind saying——

The Court: I will ask you what kind of work do you expect to do there?

The Witness: The only work with respect to construction will be the removal of obstructions to flight.

The Court: There will be no runway?

The Witness: That is correct. It is not planned to build a runway across there. In the two-mile clear zone, obstructions to flight will be removed so aircraft can land, if necessary, wheels up, doing a minimum amount of damage; in other words, so they don't run into a telephone pole, ditch or something like that.

The Court: You expect to have jet planes flying there? [52]

The Witness: Yes, sir; not only jet planes, but other flights."

It will be borne in mind that the defendants' property lies southwesterly from the Edwards Air Base, and the ground rules there provide that a take-off of airplanes must be in a northeasterly direction.

There is testimony in the record that the government will not complete the proposed work until December, 1954.

It is my view that the government should have an order of possession.

It is ordered that the defendants shall be required to surrender possession of the premises to the plaintiff at 12:00 o'clock noon May 22, 1954.

In the meantime, and until said surrender of possession, it is ordered that the defendants shall not impede or interfere with or harass the agents of the government who go on the premises for the purpose of preparing for the trial of this proceeding; that such agents shall not enter upon said property for any other purpose; that while on said premises for such purpose they shall not harass said defendants, or any of them, or defendants' servants or agents, and shall not interfere with the defendants' possession or rights in any way, and that they shall restore to its original place any property necessary to be moved in making their investigation.

In the court's opinion the above order of possession is fair and reasonable.

Dated: March 19, 1954.

/s/ C. E. BEAUMONT,
Judge. [53]

[Endorsed]: Filed Mar. 22, 1954. Judgment Docketed and Entered Mar. 23, 1954.

In the United States District Court, Southern
District of California, Central Division

Civil No. 15403-C

PANCHO BARNES, Plaintiff,

vs.

JOSEPH STANLEY HOLTNER and MARCUS
B. SACKS, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on for trial on the 13th day of July, 1954, before the Honorable James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing in propria persona, and the defendants being represented by Laughlin E. Waters, United States Attorney and Max F. Deutz, Assistant United States Attorney, and the Court having granted leave to the plaintiff to file her Second Amended Complaint, and the Court having received evidence both written and oral, and the Court being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That this action was brought in the Superior Court of Los Angeles [54] County, California as Case No. 611723 and removed to the United States

District Court for the Southern District of California, Central Division, on the motion of the United States Attorney, as counsel for the defendants.

II.

That the plaintiff since 1945 has been engaged in operating a diversified ranch and guest ranch, complete with a restaurant and bar, in Kern County, California, in the vicinity of Edwards Flight Test Center. Plaintiff has operated the ranch since 1933.

III.

That said guest ranch was patronized by military personnel, civilian employees of Edwards Flight Test Center, and civilian contractors and aircraft factory personnel having said Test Center as their place of employment.

IV.

That the defendant, Joseph Stanley Holtoner, is now, and since February 18, 1952 has been, the Commanding Officer at Edwards Flight Test Center; that Marcus B. Sacks is, and during the same period has been, the Staff Judge Advocate and Legal Officer at Edwards Flight Test Center.

V.

That there was no conspiracy on the part of the defendants to injure the plaintiff's business; that there were no intentional acts committed by the defendants to the detriment of the plaintiff's business.

VI.

That the defendant, Joseph Stanley Holtoner,

made no attempt to put the plaintiff's place of business out of bounds or off-limits to military personnel at Edwards Flight Test Center; that said Joseph Stanley Holtoner did not infer or cause inferences to be made to, military or civilian personnel to "stay away" from the plaintiff and/or her place of business.

VII.

That there was no conspiracy between the defendants and Colonel Marion J. Akers, Colonel Malcolm P. Elvin, First Lieutenant James C. Ratcliffe, Edward Carroll, or any of them, to molest, obstruct, hinder and/or prevent plaintiff from carrying on her business and/or making a living. [55]

VIII.

That on or about February 20, 1952, at a staff meeting held at Edwards Flight Test Center, a suggestion was made by someone, not General Holtoner, that the place of business of the plaintiff be placed out of bounds or off-limits; that the matter was discussed in said staff meeting and that a determination was made at that time that the place of business of the plaintiff would not be put out of bounds or off-limits.

IX.

That the Air Base Combo, a small orchestral group, which had been accustomed to play on off duty hours for pay at the plaintiff's guest ranch, did not play at said ranch on the night of February 20, 1952; that there was no formal order directing said Air Base Combo not to play at the plaintiff's ranch

on that night; that there is no evidence of any order or directive by either of the defendants that said Air Base Combo should not play at the plaintiff's ranch; that after the one occasion of failure to play on February 20, 1952, the Air Base Combo thereafter regularly filled any engagements it had to play at the plaintiff's ranch.

X.

That the defendants did not, either individually or in concert, act or conspire between themselves or with any other persons, to threaten, intimate, or by intimidation indicate, that any military or civilian personnel of Edwards Flight Test Center patronizing the plaintiff's place of business would be prevented from attaining advancement in rank or employment or that efficiency ratings would be adversely effected or that the tenure of employment of civilian employees would be endangered; that there is no evidence of any instance in which any military personnel or civilian employees were deprived of advancement in rank or employment, adversely effected in efficiency ratings, or endangered as to tenure of civilian employment by reason of having patronized the plaintiff's ranch.

XI.

That Joseph Stanley Holtoner made a statement to the effect that the plaintiff's ranch should be bombed; that said statement was made either in [56] anger or in jest and without deliberation or intent to carry out the action implied therein; that

the plaintiff's ranch was not bombed nor were there any threatening acts or gestures made in furtherance of this verbal statement; but a fire of unknown origin destroyed five buildings, including the ranch house on November 14, 1953.

XII.

That Marcus B. Sacks made a statement to the effect that the plaintiff's ranch should be bombed; that said statement was made either in anger or in jest and without deliberation or intent to carry out the action implied therein; that the plaintiff's ranch was not bombed nor were there any threatening acts or gestures made in furtherance of this verbal statement.

XIII.

That there is no causal connection between the statements of Joseph Stanley Holtoner and Marcus B. Sacks as set forth in Findings XI and XII, and any alleged damage which the plaintiff suffered; that there is no proof that any of the plaintiff's guests left her ranch through fear of any action on the part of either of the defendants; that there is no evidence of any night, or other, dynamiting done in the vicinity of the plaintiff's ranch, by military or civilian employees or contractors of Edwards Flight Test Center, done in anything other than the normal course of business in the operation of the military establishment and its environs.

XIV.

That the defendants did not, either alone, or in

concert with each other, or with any other persons, act or conspire to advise any persons, military or civilian, that the plaintiff had sold her ranch to the Government and was no longer in business.

XV.

That there was no impropriety or immorality involved in the plaintiff's operation of her guest ranch, known to or condoned by plaintiff; that the defendants, or either of them, did not make any statements or insinuations to anyone, military or civilian, that the plaintiff's conduct of her guest ranch operations was improper or immoral; that no acts or statements of the [57] defendants hurt the plaintiff's reputation among respectable people and/or attracted undesirable people to the premises of the plaintiff.

XVI.

That the Department of Justice authorized the use of the Federal Bureau of Investigation in investigating certain aspects of this litigation; that the use of the Federal Bureau of Investigation was within the authority of the Attorney General of the United States; that the Court refused to take proof as to the course or nature of the precise investigation made by the Federal Bureau of Investigation.

XVII.

That the plaintiff has been, for a period of some years, a base contractor doing contract business on Edwards Flight Test Center; that part of her con-

tracting business was to contract for the hauling of garbage for her hog ranch; that the defendants did not act together or conspire or act individually in any way to prevent the plaintiff from securing a renewal of her contracts or to cause the plaintiff to be overlooked at the time of the issuance of bids for said contracts; the Court further finds that the husband of the plaintiff, E. S. McKendry, was awarded the contract for hauling garbage to the plaintiff's hog ranch on the particular occasion of which the plaintiff complains in her complaint.

XVIII.

That certain military and civilian personnel of Edwards Flight Test Center attempted to form a riding club for recreational purposes; that the members of said club originally contemplated using the facilities of the plaintiff's ranch, including her Pancho's Happy Bottom Riding Club; that the organizers of the riding club from the Test Center, for reasons of their own, decided not to use the plaintiff's facilities; that thereafter, members of the riding club, then being formed, petitioned the military authorities at Edwards Flight Test Center for permission to have an organized club under the authority and sponsorship of the military establishment; that permission to form such a club was refused on the ground, among others, that to form such a club would actually be in competition with the activities of the [58] plaintiff who had horses for hire and club activities in the near vicinity, whereas many of the members of the club contemplated the use of

their own horses; that the disapproval of the club was in no way brought about by malice or animosity on the part of the defendant, Joseph Stanley Holtoner, or any other person in the military establishment.

XIX.

That the defendants refused to permit Constable Hodges of Mojave to make a service of process on General Holtoner at the Edwards Flight Test Center; that said action was the result of a misunderstanding of the existing law as to jurisdiction of the service of process on the part of Joseph Stanley Holtoner and Marcus B. Sacks; that in the preliminary proceedings in this action, involving removal to the District Court, the defendants were admonished and cautioned by this Court as to the manner in which they should submit to the service of process; that thereafter there have been no further misunderstandings as to the service of process; that after such admonition there has been no discipline, punishment, or recrimination against the civilian employee, Clifford Morris, who actually made service of process upon General Holtoner in a restricted area at Edwards Flight Test Center; that Clifford Morris was frightened and intimidated by the defendant Sacks at the time of his service of process on General Holtoner prior to the admonition of the Court above referred to, but there was no conspiracy between the defendants and Ed Carroll, or any other person, to frighten or intimidate Clifford Morris in connection with the service of process.

XX.

That Joseph Stanley Holtoner did ignore a subpoena directed to him from the Superior Court to attend a deposition; that said subpoena was ignored because the case was in the process of being removed to the United States District Court.

XXI.

That the defendants did not conspire together and/or contrive to illegally cut off the main county road running by the plaintiff's place of business.

XXII.

That the defendants, together with Colonel Marion J. Akers, or otherwise, did not conspire or act individually to have Malcolm P. Elvin, or any other person, inform the Automobile Club of Southern California that they were not to include the plaintiff's place of business on the club maps; that the testimony of the representative of the Automobile Club of Southern California clearly showed no attempt by anyone in the military establishment to influence or dictate the manner of preparation of maps of that organization.

XXIII.

That there was no conspiracy between the defendants and Colonel Akers, or any other person, to obtain an unnecessary and/or premature "Order of Possession" of the plaintiff's property; that there was no perjury or false statements on the part of Colonel Akers.

XXIV.

That the defendants, or either of them, did not conspire with any persons to harass and hurt the plaintiff, as alleged in Paragraph XVIII of plaintiff's Second Amended Complaint; that certain photographs were taken of the plaintiff's premises in connection with the condemnation proceedings.

XXV.

That there was no conspiracy on the part of the defendants between themselves or with any other persons to commit a trespass on the property of the plaintiff; that at the time of the alleged trespass set forth in Paragraph XXIX of plaintiff's Second Amended Complaint, title to the property in question had already vested in the United States of America under a Declaration of Taking in the condemnation proceedings; that there was no perjury or improper acts upon the part of Lieutenant Colonel Sacks or Colonel Akers in connection with these matters.

XXVI.

That there was no conspiracy between the defendants and Lieutenant Ratcliffe to blacken the reputation of the place of business of the plaintiff; that the Court has no reason to disbelieve the testimony of Lieutenant Ratcliffe as to the events at the plaintiff's ranch to which he testified; [60] that there is no evidence, however, that the plaintiff had knowledge of the fact that said events transpired.

XXVII.

That there was no conspiracy between the defend-

ants, or any individual acts by either of them, to misuse or misquote testimony of Air Force Warrant Officer Tony Padavich.

XXVIII.

That in July of 1952, the Aviation Writers of America held a convention in Los Angeles and visited the Edwards Flight Test Center; that after spending the greater part of the day at Edwards Flight Test Center, where flight demonstrations were given and exhibits displayed, some of those in attendance at the convention visited the ranch of the plaintiff for a dinner or banquet staged there; that there is some evidence that the proceedings at the plaintiff's ranch were somewhat abbreviated due to changes in schedules of transportation and delays in completing the flight exhibition at Edwards Flight Test Center; that there is no evidence of any deliberate intent or act on the part of the defendants, or anyone in the military establishment, to hurt the business of the plaintiff or to interfere with her banquet activities.

XXIX.

That there is no evidence submitted as to the net profits or losses of the plaintiff in the operation of her ranch activities prior to and during the period of the alleged acts complained of in plaintiff's Second Amended Complaint, but that plaintiff waived, at the start of the trial, any claim for damages in excess of \$10.00 from each defendant; that there was evidence that plaintiff's gross income dropped

off after General Holtoner took command of the base.

XXX.

That the Court finds that the plaintiff, Pancho Barnes, is a courageous, forthright individual, a Native Daughter of California, a person with apparent great interest in the conduct and well being of the Air Force; that Joseph Stanley Holtoner is a general officer of the United States Air Force; [61] that he apparently enjoys an excellent military record; that he had probably never encountered a public relations problem such as that dealing with the plaintiff; that he had or assumed duties as Base Commander in relation to the condemnation of the plaintiff's land which unfortunately aggravated the situation; that the over-all evidence in this case indicates a condition of mutual aggravation rather than malice or animosity on the part of any of the parties.

XXXI.

That this Court makes no findings of fact as to the truth of any of the allegations in the pleadings except as expressly set forth herein.

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That there was no conspiracy between the defendants, or in conjunction with any other persons, to injure the plaintiff in her business reputation.

II.

That there were no tortious acts on the part of the defendants directed toward the plaintiff or any of her business activities.

III.

That all of the activities of the defendants in conjunction with the plaintiff and/or her ranch activities were either actually, or honestly believed by them to be, within the scope of their duties as members of the United States Air Force.

IV.

That judgment should be entered for the defendants, each party to bear its own costs.

Let judgment be entered accordingly.

9/22/54.

/s/ JAMES M. CARTER,

United States District Judge. [62]

Affidavit of Service by Mail Attached. [63]

[Endorsed]: Filed Sept. 23, 1954.

[Title of District Court and Cause No. 15403-C.]

JUDGMENT

The above entitled matter having come on for trial on the 13th day of July, 1954, before the Honorable James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing in propria persona, and the defendants being represented by Laughlin E. Waters, United States Attorney and Max F. Deutz, Assistant United States Attorney, and the Court having granted leave to the plaintiff to file her Second Amended Complaint, and the Court having received evidence both written and oral, and the Court being fully satisfied in the premises, and the Court having made and filed its Findings of Fact and Conclusions of Law:

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendants have judgment; that the plaintiff take nothing; that each party [64] bear its own costs.

Dated at Los Angeles, California this 22nd day of September, 1954.

/s/ JAMES M. CARTER,

United States District Judge. [65]

Affidavit of Service by Mail Attached. [66]

[Endorsed]: Judgment Filed, Docketed and Entered Sept. 23, 1954.

United States Court of Appeals
for the Ninth Circuit

No. 14,380

E. S. McKENDRY and PANCHO BARNES,
Appellants,
vs.

UNITED STATES OF AMERICA, Appellee.

Appeals 1 and 2—Jan. 31, 1955

OPINION

Upon appeals from the United States District
Court for the Southern District of California,
Northern Division.

Before: Stephens, Fee and Chambers, Circuit
Judges; James Alger Fee, Circuit Judge:

There are here pending two appeals from orders in connection with the condemnation of fee simple title to three hundred sixty acres of land in Kern County, California, which is owned by appellants. The declared purpose of the taking was that this realty would be used in the expansion of Edwards Air Force Base. On February 27, 1953, complaint in the action and declaration of taking were filed.¹ The estimated just compensation for the taking of this parcel, deposited concurrently in the registry of the court, was \$205,000.00. An order vesting title

¹ 40 U.S.C.A. § 258(a).

in the United States pursuant to the filing of the declaration was entered March 2, 1953.

Upon motion of appellants, the court ordered \$194,402.73 paid from the sum on deposit on their account.² Thereafter, when the [67] United States had filed a motion for immediate possession of the parcel, appellants moved to set aside the declaration of taking and the judgment entered pursuant thereto, and at the same time moved to dismiss the condemnation proceeding. Both these motions were denied by Hon. Campbell Beaumont, district judge, on March 23, 1954, and at the same time it was ordered that the premises should be surrendered on May 22, 1954. On May 10, 1954, a minute order was entered confirming the previous holding, but postponing time for surrender until July 24, 1954. These appeals were taken from the orders of March 23, 1954 and May 10, 1954.

The government urges that the appeal is premature and should be dismissed, since no final order is involved.³ A denial of a motion to dismiss alone never lays foundation for review in federal appellate courts. As far as the vesting of title is concerned, that depends upon final judgment in the

² "Upon application of the parties in interest, the court may order that the money deposited in court, or any part thereof, be paid forthwith * * *." 40 U.S.C.A. § 258(a).

³ The latest opinion of this Court on final orders is *Libby, McNeill & Libby vs. Alaska Industrial Board*, 9 Cir., 215 F.2d 781.

proceeding. It is not necessarily irrevocable inasmuch as procedure is provided to set aside the investment by consent properly entered.⁴ Unquestionably, the title could be revested in the former owner upon a finding of fraud or lack of jurisdiction. For “* * * title is not indefeasibly vested in the United States merely by following the administrative procedure.” Cf. *Catlin v. United States*, 324 U.S. 229, 242. Therefore, the appeals must be dismissed. *Polson Logging Co. v. United States*, 9 Cir., 149 F.2d 877.

The government goes further and makes an alternative motion for affirmance of the judgment because appellants drew down part of the money deposited with the declaration. But the statute above cited was passed for the express purpose of allowing the government possession and use of the land involved without [68] awaiting termination of interminable litigation.⁵ To be fair, the government had

⁴ There is express procedure for revesting of title in the former owner by consent. “In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise.” 40 U.S.C.A. § 258f.

For comparison, see *United States vs. 44.00 Acres of Land*, 110 F. Supp. 168.

⁵ “The two principal purposes of Congress, in making provision in the Declaration of Taking Act for the estimating of just compensation and the depositing of the amount thereof in court, undoubtedly were to minimize the interest burden of the

to accord to the landowner the use of the money which stood in place of the land during pendency of the proceedings. Otherwise, the law would have been an instrument of oppression. Cf. *United States vs. Richardson*, 5 Cir., 204 F.2d 552. Congress clearly recognized the necessities on each the part of the government and the landowners.

It would be anomalous to say that the landowner must wait until final judgment to appeal from the steps to acquire title and from the judgment on the declaration, and yet he is precluded from the appeal because he has applied for and received a portion of the fund placed there for his use instead of the land which the government is using. Of course, title would not be divested unless the landowner returned the money.

The government is on the horns of a dilemma. Either the order vesting title can be reviewed upon appeal from final judgment or the order is final and can now be appealed.

The appeals are premature and are dismissed.

[Endorsed]: Opinion. Filed Jan. 31, 1955. Paul P. O'Brien, Clerk. [69]

Government in a condemnation proceeding, and to alleviate the temporary hardship to the landowner and the occupant from the immediate taking and deprivation of possession. *United States v. Miller*, 317 U.S. 369, 381, 63 S.Ct. 276, 283, 87 L.Ed. . . . ; *Atlantic Coast Line R. Co. v. United States*, 5 Cir., 132 F.2d 959." *United States vs. 1997.66 Acres of Land*, 8 Cir., 137 F.2d 8, 11.

[Title of Court of Appeals and Cause No. 14,380.]

Appeal 3—Jan. 31, 1955

OPINION

Upon appeal from the United States District Court for the Southern District of California, Northern Division.

Before: Stephens, Fee and Chambers, Circuit Judges; James Alger Fee, Circuit Judge:

In the condemnation case in which we this day have dismissed other appeals the declaration of taking procedure was followed and the court entered judgment declaring the title to be vested in the United States. The government, however, did not enforce its right to possession of the lands, but permitted the former owners to occupy the parcel involved.

On August 29, 1953, the United States filed a motion for an order of immediate possession. Appellants filed a motion to dismiss the action and a motion praying for a setting aside of the declaration of taking and the judgment vesting title. During the pendency thereof, they began to construct buildings on the parcel to which the court had adjudged title to be in the United States pursuant to the declaration and deposit of estimated just compensation.

On February 2, 1954, there was filed a motion for a temporary restraining order to prevent the continuance of such construction on behalf of the government. The motion was granted, and appellants were

ordered to show cause why a temporary injunction [70] should not issue. An order granting a temporary injunction entered February 15, 1954.

This appeal was taken from that order on March 17, 1954.

On August 7, 1954, it is shown to this Court, appellants surrendered possession of the premises.

The order of temporary injunction based upon the continuing possession and use of the parcel by appellants became *functus officio* upon surrender. Appeals from the final judgment will lie to review any error relative to the transfer of title of which the landowners may legally complain.

The appeal here is dismissed because this particular controversy is moot.

[Endorsed]: Opinion. Filed Jan. 31, 1955. Paul P. O'Brien, Clerk. [71]

[Title of District Court and Cause No. 1253-ND.]

NOTICE OF MOTION TO DISMISS

To The Plaintiff's Attorney, Laughlin E. Waters:

You Will Please Take Notice that on Monday, May 2, 1955, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as the matter can be heard, in the United States Courtroom, U. S. Post Office & Court House, Fresno, California, the defendants, Pancho Barnes, E. S. McKendry and

William Emmert Barnes, will present the within Motion to Dismiss.

Dated at Los Angeles, California, this 22nd day of April, 1955.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona. [72]

[Title of District Court and Cause No. 1253-ND.]

MOTION TO DISMISS

Come now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court that the Complaint on file herein be dismissed for the following reasons:

I. That the Secretary of the Air Force and the Assistant Secretary of the Air Force acted arbitrarily and capriciously and without adequate determining principle, was unreasoned, and acted in bad faith when they instituted the condemnation suit.

II. That fraudulent misrepresentations were made to Congress regarding the properties to be condemned.

III. That Public Law 564 approved June 17, 1950 did not include the subject property nor did any other Public Law as mentioned in the Complaint include said property.

IV. That said property was not necessary to the expansion of the Edwards Air Force Base and no public use was intended or planned for the subject property.

V. That this Court lacks jurisdiction of the condemnation suit [73] because the property was obviously not included in the Statutes under which the Condemnation Suit was instituted.

VI. That agents of the Air Force directed by higher headquarters and or the Secretary of the Air Force, did so harass the defendants, and did harm their business in attempts to discourage and sicken them to the point that they would be willing to leave and sell out without the benefit of the due process of law.

VII. The Secretary of the Air Force has attempted to attain his ends without granting the defendants their rights under the Constitution and particularly the V Amendment.

This Motion will be based upon the pleadings on file in the within action and upon the Memorandum of Points and Authorities and on such documents, affidavits, witnesses and arguments as offered in support of the motion.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona. [74]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause No. 1253-ND.]

NOTICE OF MOTION TO SET ASIDE DECLARATION OF TAKING AND TO VACATE AND SET ASIDE EX PARTE JUDGMENT

To The Plaintiff's Attorney, Laughlin E. Waters:

You Will Please Take Notice that on Monday, May 2, 1955, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as the matter can be heard, in the United States Courtroom, U. S. Post Office & Court House, Fresno, California, the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, will present the within Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment.

Dated at Los Angeles, California, this 22nd day of April, 1955.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona. [79]

[Title of District Court and Cause No. 1253-ND.]

MOTION TO SET ASIDE THE DECLARATION
OF TAKING DATED FEBRUARY 27, 1953,
AND TO VACATE AND SET ASIDE THE
EX PARTE JUDGMENT ENTERED
THEREON, DATED MARCH 2, 1953

Come now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court set aside the Declaration of Taking dated February 27, 1953, and to vacate and set aside the ex parte judgment entered thereon, dated March 2, 1953, for the following reasons:

I. That the Secretary of Air and his subordinates did wrongfully use and abuse the Declaration of Taking Act. Did wilfully, arbitrarily, capriciously and without reasonable or adequate determining principle and acting in bad faith did invoke the use of the Declaration of Taking Act. (a) That fraudulent misrepresentations were made to Congress regarding the properties to be condemned. (b) That Public Law 564 approved June 17, 1950, did not include the subject property nor did any other Public Law as mentioned in the Complaint include said property. (c) That said property was not necessary to the expansion of the Edwards Air Base and no public use was intended or planned for the subject property. [80]

II. That the Declaration of Taking was filed on February 27, 1953 and an Ex Parte Judgment was rendered on March 2, 1953 without any notice being given to any of the Defendants by the Government. Nor did each or any of the Defendants have any knowledge that the Government was acquiring an Ex Parte Judgment against their property. Said Decree and or Judgment was unconstitutional and was in violation of the V Amendment and was not according to due process of law; and was unnecessary to the Administrative procedure regarding the filing of a Declaration of Taking.

III. That the estimation of "Just Compensation" was made in bad faith. The estimate of just compensation was on its face plainly inadequate. The estimate was a mere nominal sum related to the overall value of the property. The actions on the part of the Acquiring Authority in their arbitrarily and capriciously act of bad faith amounted to a non-compliance with the statute.

IV. The Secretary of the Air Force has attempted to attain his ends without granting the defendants their rights under the Constitution and particularly the V Amendment.

This Motion will be based upon the "Declaration of Taking" on file and the "Decree on the Declaration of Taking"; on testimony at the time of hearing; affidavits making a prima facie showing of non-compliance with the statute; exhibits proving bad faith in the manner of appraisal of the lands

and building; and other and sundry documents in support of the Motion.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona. [81]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause No. 1253-ND.]

AFFIDAVIT OF PANCHO BARNES AND
E. S. McKENDRY

Pancho Barnes and E. S. McKendry, being first duly sworn, depose and say:

That they are defendants in the above entitled action;

That the government had made an appraisal of the subject property by one Bernard Evans during the Spring of 1952. Mr. Evans was on the property briefly, visiting it and giving it a haphazard and cursory inspection. He arrived late the first day and returned for a few hours on the next day. He did not go over the property very thoroughly. He refused to look at much of the property which he was requested to see by Mr. McKendry.

In the latter part of August, 1952, Mr. Joe Maritzen, Chief of the Acquisition Branch of the Los Angeles District Corps of Engineers, made an offer

for the property in the sum of \$205,000.00. This offer was immediately and promptly turned down by these affiants. No other offer was ever made at any time and these affiants did inform Mr. Maritzen at this time that they did oppose the taking of the property.

These affiants further informed Mr. Maritzen at this time that they had turned down on two occasions bona fide offers from two separate parties in the amount of \$1,500,000.00 for the property. They explained to Mr. Maritzen that they [83] believed that the appraisal had been lax and slipshod and could not conceive of how he had arrived (if he had arrived) at such an inadequate and disgraceful sum.

These affiants further say that the government and the appraiser did not even know the correct acreage of the property. That because of sectional variation the property consisted of several more acres (approximately six) than the government took *cognizant* of.

A prima facie showing of the value of the property shows some 40,000 square feet of buildings, a reasonable replacement value of which would be \$12.00 per square foot; a swimming pool complete with filter system, steam boiler and heating plant and built into symmetrical and artistic design, being some 40 foot across to the east and west and approximately 8 to 10 feet wider to the north and south, with a depth starting with the ramp at zero degrees and being approximately 9 feet in depth, and lighted by underwater lights. Said pool and

equipment would be worth approximately \$20,000.00.

The property had 5 wells with such abundant water that, including the irrigation of approximately 100 acres of crops and other demands for domestic water and water for the stock, only one well was necessary to supply the demands.

The buildings above referred to consisted of a hotel building with 20 units, each complete with bath, and a manager's apartment with bath and kitchenette, a library, tower, service rooms and administrative offices. The hotel building was constructed in a "U" shape and had a massive ornamental rock foundation with several tiers of waterfalls extending some 12 feet in the air and flanked with fish ponds, a total length of approximately 54 feet long and 2 to 3 feet deep and varying in width from 5 to 10 feet. The garden was landscaped and planted with flowers, cactus, shrubbery and trees.

There was a restaurant adequate to handle large parties and in fact on occasions several thousand people were catered to from this restaurant and dining rooms. There were 2 bars, a small one with an open fireplace which served as a combination guest-living room and bar. The big bar was situated in the dance hall. The bar itself was approximately 45 feet long. The building in which it was situated was approximately 55 feet wide by 65 feet long, the ceiling was approximately 14 feet high. This room was lavishly decorated and contained a 30 feet wide by [84] 16 feet long mural (because

of the alcove-shape of this mural it actually had more area than the height of the ceiling). There were other pictures and decorations of a permanent nature.

The club house had many rooms for storage, living quarters and lavatories.

There was a women's dormitory for the female help, 7 bungalows and/or houses for the accommodation of help and they were sometimes also rented to guests.

There was also the owner's house in which the affiants lived which was a very fine house indeed, consisting of a large living room, 4 bedrooms, 2 baths and incidental rooms. Adjacent to this building was a large recreation building used exclusively by the owners and referred to as the summer kitchen. Adjacent also to the owners' house were the dog kennels and the owners' chicken houses and yards.

Another substantial building on the ranch consisted of the dairy barn complete with automatic milking machines, feed rooms, laboratory for milk testing, etc., together with the creamery building consisting of a large bottle washing room, the milk room itself, large ice boxes, walk-in deep freeze large enough to hold some 6 or 8 whole beef carcasses, vegetable room, etc.

Large implement building and implement sheds for farm machinery.

The entire plant for hog raising and feeding con-

sisting of pens, shelters, large concrete feeding platforms, water systems.

Complete rodeo grounds; an arena of approximately 355 feet long and more than 100 feet wide. There were permanent grandstands on one side of the arena and concrete box seats on the "shady side" of the arena. The arena had 8 bucking chutes, calf chute and team roping chute, had an announcer's stand, approximately 20 feet high sufficient to accommodate some 10 or 12 people. Adjacent and leading into the bucking chutes was a considerable stock yard with some 7 or 8 pens of varying sizes, all arranged with stock gates that would permit the moving of stock in the same manner as done in the Los Angeles Union Stock Yards, together with alley-ways for segregating stock into the various bucking chutes. On the opposite end of the arena were large and adequate "holding" pens for cattle and horses and the entire arena was brilliantly lit in such a manner [85] that when night performances were given the cowboys' ropes did not cast a shadow. The overhead lighting alone had a value of in excess of \$12,000.00.

There were 2 race tracks consisting of an oval track of 3 furlongs leading into the straightaway track of one-half mile. This track was all professionally fenced and leaned away from the track so that the riders would not be hit or injured on the fence when horse races were being run.

In addition to the corrals at the rodeo grounds, there were heavy cyclone fence horse pens to ac-

commodate brood mares and stallions. A portion of the alfalfa fields were also fenced appropriately to protect young foals so that they could be turned out with their mothers for green pasture.

There were approximately 100 acres of alfalfa hay irrigated by underground concrete pipes, valves and checks.

There were some 366 shade trees on the ranch, some of which were more than 25 years old, consisting of many varieties, cottonwood and Arizona cypress predominating, as well as ornamental shrubs, approximately 1500 lineal feet of cane wind-breaks, etc.

Other incidental structures, such as additional dog kennels as distinguished from the ones close to the owners' house, tack room, etc.

The main well was run by electricity with a large diesel standby engine housed in a diesel house and supplied by a 10,000 gallon oil storage tank and with lines to the steam boiler, which was sufficient to supply heating for the swimming pool, sterilizers for the dairy, and steam for cooking of the hog food or garbage. Adjacent to the diesel pump house was the carpenter's shop.

Adjoining the club house was a 20,000 gallon concrete domestic water tank together with a pump house to house the pressure systems. Around the club house, hotel buildings, etc. there was much flagstone and brick pavements and walkaways, the swimming pool patio was fenced and a large arbor and sundeck was on one side of the pool.

There was also the entire layout for a new horse barn, including all of the roughed in plumbing and cesspools completed for 3 bathrooms.

There was a great deal of fencing and cross fencing.

The ranch was supplied with a Lancaster telephone, the main office of [86] which was 23 miles away. 8 miles of this telephone line was privately run at the affiants' expense in order to be able to have telephone service at the ranch. The ranch was equipped with several phones, including a public pay phone.

There was a very expensive and fine cattle guard at the front entrance of the ranch and the adjoining territory had excellent grazing in the spring of the year and was open range and worth a great deal to the owner in feeding horses and cattle.

The airport was one of the finest in the entire country, having 3 separate runways, the main runway being 400 feet wide and adaptable to handle ships such as DC-3's. Many military aircraft landed on the field, including P-38's, P-40's and P2-V's, etc. The field was more than adequate to handle average air traffic. The field was lit at night, had gasoline and all servicing facilities. The main hangar consisted of sufficient space to accommodate some 10 private aircraft, had a large and adequate shop, class rooms for students, lounge room, offices, pilot's ready room, 360 degree control tower, 8 bedrooms and men's and women's lavatories consisting of several basins, urinals and toilets. The hangar

overall 80x80 feet and constructed with Summerbell trusses and was of beautiful and artistic design, including porches for shade on both sides and large windows for lighting the various rooms. There was a smaller hangar and shop and a third hangar for storage.

The entire plant comprised practically a small village and was adequate in every respect. The soil was as fine as any soil within the entire Antelope Valley and had been conscientiously and carefully tended and fertilized over a period of 20 years as almost all of the crops raised on the place were returned to the soil by the manure spreader.

The ranch was situated on the main road leading from Rosamond to Muroc, which highway was paved. Whereas there were 2 additional public roads on either side of the property.

The affiants are cognizant of the fact that the government did pay \$593,500 for only 240 acres of barren desert land, without water or any improvements whatsoever, approximately $\frac{3}{4}$ of a mile to the south of their property and not adjoining any road, within a month or two of the time when the government filed their fantastic condemnation suit on these affiants on their some 366 acres of highly improved land with abundant water and every facility.

Insomuch as the affiants did turn down 2 bona fide offers, one in 1950 and the other in October, 1952, each in the sum of \$1,500,000, even the roughest calculation of the highly improved acreage and

the approximate 40,000 square feet of buildings plus all of the other assets of the ranch as above mentioned, plainly and undoubtedly show that the government made their offer in bad faith and that the offer was a mere nominal sum compared with the true value of the property.

Representatives of the government have verbally from time to time admitted that the appraisal was unfair and inadequate. Colonel Shuler, when he was still the District Engineer, made the remark that the government couldn't possibly go to court with that appraisal.

Mr. Weymann, the Assistant United States Attorney in the Lands Divisions, previously in charge of the affiants' case, remarked on several occasions that the offer was plainly inadequate.

In the winter of 1953-54 the affiants did cover the arbor adjoining the swimming pool with an impervious temporary cover of celluglass to protect the winter swimmers from the wind and the government did bring an injunction against the affiants which proceedings were heard on Friday, February 5, 1954 in the Court at Fresno, California, the Honorable Leon R. Yankwich presiding, at which time Mr. Weymann, the government attorney, did state on page 55 of the transcript, beginning at line 16: "Our position is this: that the Government, as the owner of that property, has the absolute right to have the status quo maintained until the determination of this action. Not only because of the expense, whether it be great or small, in demolishing these

structures eventually, but because of the difficulty of having a proper appraisal made.”, which is an admission that the government never did make a proper appraisal; that they were quite cognizant that they had not made a proper appraisal and yet they had arbitrarily and capriciously filed a condemnation suit approximately one year previous to this statement which is of the court record and in which they admit that no proper appraisal has been made. The fact that they did not make a proper appraisal and knew it and yet had the audacity to make the inconsequential offer that they did, proved beyond doubt that [88] the offer was in bad faith and constituted a mere token compliance with the statutes.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY.

Subscribed and sworn to before me this 26th day of April, 1955.

[Seal] /s/ VIOLET O. RYBURN,

Notary Public in and for said County and State.

My Commission Expires May 28, 1956. [89]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed April 27, 1955.

[Title of District Court and Cause No. 1253-ND.]

SUPPLEMENTAL SPECIFIC INFORMATION
ON MOTION TO DISMISS AND MOTION
TO SET ASIDE DECLARATION OF TAK-
ING AS REQUESTED BY MR. McPHER-
SON, ASST. U. S. ATTORNEY

Come Now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and do here provide in detail the information and specifics as requested covering paragraphs I, II, III, and VI of the Motion to Dismiss, and etc.

Public Law 564 of the 81st Congress approved June 17, 1950 was the only specific Statute purporting to apply to the subject property. The only words remotely applicable were the ambiguous phrase—"land for Base Expansion,"—The defendants did ask for specific information as to the lands required for this expansion. The Government refused the information as requested. The defendants did attempt to get this information by subpoenaing the proper authorities duces tecum. The Government made motions to quash and did arrange to have these motions to quash heard on the same date as the defendants had set for their motions. Therefore, the Government outsmarted and thwarted the defendants.

The defendants had a very difficult time digging out [91] the committee meetings referring to the land required for base expansion. The Superintendent of Documents did inform them that no copies

were to be had. Eventually the defendants procured the hearings of both the 1st and 2nd Session of the 81st Congress as related to the procurement of land at Muroc.

Here now the defendants do accord to the Government the courtesy which was denied them and do explain that of which the Government is entirely cognizant, and which information the Government did so assiduously and in a clandestine manner dishonestly conceal from the defendants.

In the 1st Session of the 81st Congress, the Air Force did ask for "139,000 acres of land" and "\$4,500,000" for the purchase thereof. But they evidently did not pursue this tack. As in the 2nd Session of the 81st Congress, they ask for \$3,800,000 and propose to buy 80,500 acres.

It seems that a Congressman Leroy Johnson of California did briefly visit the Muroc Air Base and wrote a report thereon dated at Washington, D. C. December 6, 1948. This report (which was put into the records of the 1st Session) reflects the opinions of Col. S. A. Gilkey, who was at that time commanding the Muroc Base and had dreams of Empire. Col. Gilkey and his opinions were well known to the defendants. Congressman Johnson states "The commanding officer, Col. S. A. Gilkey, was most cooperative and cordial. He took us around the base and we got to see practically everything in the 2 days we were there. He also gave us an excellent briefing on the program being carried out and the future plans for the base." Congressman Johnson goes into ecstasies over the marvelous

things he saw on the Base. At the time of his visit, the Air Force was in a whirl over the X-1 and piercing the Sonic Barrier, and everything concerning the operations was highly secret. Aviation had hit a milestone that would stand until someone flies faster than the [92] speed of light! However, Congressman Johnson never mentions looking at any of the "desert" in the vicinity. His information sounds strictly hearsay and the information he gave Congress was incorrect. Referring to the record it says:

Mr. Bates. What did you have to say about the acquisition of this entire townsite?

Mr. Johnson. This is not a town; it is only a station, they are building in that area.

Colonel Myers. We only have a few buildings; we have a dozen buildings altogether. It is a stop on the railroad. There is a post office and a few other buildings.—

The Chairman. Now, Mr. Johnson, will you give the committee briefly the results of your trip out there and your recommendations with reference to it?

Mr. Johnson. They are in the letter you just placed in the record, but the major recommendation was that we acquire any other land that was necessary. (Emphasis added.) The cost of that land is not very high. Of course part of it is improved. Part is in alfalfa, and they have pumps there and buildings on it. Another thing, there is a commercial business there. (Emphasis added.) That is a mountain of mud which is used in oil drilling. I

do not know what the details are, but they have a considerable operation there.

I believe the cost they have is a reasonable cost. The main purpose of acquiring all of it is that people are moving in around the base and building shacks and renting them to people on the base. (Emphasis added.)

Mr. Durham. You mean you are getting mud instead of land?

Mr. Johnson. No; we are getting some very fine land.

Mr. Bates. Are you buying land?

Mr. Johnson. Buying land and buying the operations on the land. (Emphasis added.) [93]

We the defendants here point out that Mr. Johnson spent some part of the two days on the Base. That he shows no first hand knowledge of the true situation. That he never states that he saw any of the land the Air Force wished to acquire. He specifically says that there is “a commercial business there.” (Emphasis added.) When asked about the town of Muroc, Mr. Johnson says “This is not a town; it is only a station, they are building there.” He says “The main purpose (emphasis added) of acquiring all of it is that people are moving in around the base and building shacks and renting them to people on the base.”

We the defendants do not accuse Mr. Johnson of deliberately misinforming the Congressional Committee. His information leads us to conclude that he personally did not visit the Town of Muroc. The Town of Muroc was a small but complete

desert town. Anderson's General Store was and had been there since 1912. The store had everything and was quite as fabulous in its way as breaking of the "Sonic barrier" was in its respect. It contained groceries, meats, ice, wine, beer, newspapers, magazines, drugs, yardage, clothing hardware, tires, auto accessories, harness, and etc., etc. We desert rats had a saying "If you can't find what you want in Los Angeles, go to Anderson's." There were three gas stations in the town, two garages, an excellent restaurant that had been there before or about the beginning of World War II.

There was another large restaurant of later date, modern with excellent food. A snack bar-soda fountain; a barber shop; cleaning and laundry establishment. There was an off-sale package liquor store that sold many other items. There was a modern high class clothing store. There were a great many private rentals—not "shacks." There was the Kern County housing that we believe housed some 800 people. There was the Post Office, Santa Fe station and freight houses, V.F.W. Club House, the [94] Public Schools and many old time residents which were there before the Base was ever built and they were certainly not encroaching on the Base, but vice versa.

Mr. Johnson tells Congress that "there is a commercial business there. That is a mountain of mud which is used in oil drilling." The mud company to which he referred was not in the Town of Muroc, but was some 8 miles from the town in a northeasterly direction and situated out on the lake itself.

We now take up the 2nd Session of the 81st Congress.

Mr. Sheppard. We will take up the next item, the "Muroc Air Force Base, Calif.," where I see that you are making a request for \$3,800,000.

General Myers. Muroc is, of course, the large base for our experimental aircraft, developmental aircraft. You all know that we have a large lake there, a dry lake, that lends itself to this type of work so that these airplanes can land on it. It is 15 miles long and some 6 miles wide. We need a lot of land there, and that is one item we have in here for the base expansion. Our requirement is about 139,000 acres. This will provide for approximately half of that at an average cost of about \$34 per acre.

Mr. Sheppard. Does the \$34 per acre include some of the mining locations that you are going to have to take over?

General Myers. It includes those mud-mining operations, and we have worked out an arrangement with them whereby we can acquire their properties and they can move over to a new location.

Mr. Sheppard. In other words, there is nothing in this proposal directly or indirectly that is going to cause the cessation of that operation?

General Myers. It will cause the stopping of the operation on the lake itself, but they will move over to another lake to the southwest. (Emphasis added.)

[95] (The only lakes to the Southwest are Rosamond Lake, Buckhorn, and other small lakes. So that General Myers' statement is confusing and

misleading in view of Air Force procedures, inso-much as the Air Force represented to Judge Beaumont on these defendants' first motions that they were taking all of these lakes in the expansion program.)

Cost of Land

Mr. Wigglesworth. How much land do you propose to buy?

General Myers. 80,500 acres at about \$32.40 per acre, based on the over-all appraisals the engineers have made in the area.

Mr. Sheppard. Regarding the cost of the acreage, does that figure cover the across-the-board percentage? You recognize the fact that there will be high and low spots?

General Myers. That is right. The mud mining operations will be more expensive.

Mr. Sheppard. That is what is shoving the price up on the average. The land itself is very definitely desert. (Emphasis added.) I would say that the cost of the land is that high because of the mud mining operation?

General Myers. That is right.

Mr. Sikes. For what purpose do you propose to buy 80,500 acres?

General Myers. We have to acquire the land on this lake, or part of the land on the lake. We have to put a runway in their eventually, and we have to relocate the railroad that runs right across the lake. We have to acquire the land for that, and then we are acquiring land in the vicinity to prevent encroachment on the base area.

Mr. Wigglesworth. What will the total acreage be?

General Myers. 139,000 acres plus the acres we have now. [96]

General Spivey. It is 161,375 acres at present.

Mr. Wigglesworth. You are going to increase it by 50 per cent?

General Myers. I have a map here that shows the existing reservation, 156,560 acres. Proposed acquisition, 139,000 acres.

Mr. Wigglesworth. I thought you said 85,000.

General Myers. The total additional land we require is 139,000 acres. In this estimate we are able to procure 80,000 of that.

General Spivey. This is just a portion of that.

Mr. Joe McPherson, Attorney for the Government and the head of the Lands Division in Los Angeles, has said that if the defendants did not be completely specific and detailed that he would have the Court continue the motions until all cards were laid on the table. The defendants did show Mr. McPherson the photostats of the Government records and explain fully to him.

The above Congressional Committee meetings very thoroughly did go into what land was going to be acquired; for what purpose; and where said land was located. This resulted in Public Law 564 approved June 17, 1950. The subject property is located some eight miles southwest of the Town of Muroc and not in the vicinity of the land as described. Congressman Johnson said the "recommendation was that we acquire any other land that

was necessary." The Government has never shown any necessity for the subject property. Had the subject property been intended to be included in the land discussed by Congress, there would have to be mention and description of said property because it was a nationally known guest ranch hotel. Restaurant, bars, dance hall, rodeo grounds where nationally known Championship Rodeos were held. Horse ranch, hog ranch, cattle and [97] hay ranch. It involved several commercial businesses. The airport was internationally known and marked on all the World Charts. The airport was Government Approved and at the time of the Congressional Hearings had a G.I. Bill of Rights Flight school in operation, and also was Government and State licensed.

The subject property was larger and worth more than the whole town of Muroc. It was worth more than the Mud Mines. It was obviously not shown to Congressman Johnson. It was not mentioned to Congress. Even its location was not mentioned to Congress. The very description of the subject property as titled in the case was "360 acres of land in the County of Kern, State of Calif." was inaccurate and misleading as the condemnation was not for the land alone but everything on it, and the description beggars the property. Further proof of the fact that the subject property was not included in the Public Law 564 is definite because of the information given Congress and their understanding of said information is clear. For instance: Mr. Sheppard says—"The land itself is very defi-

nately desert. I would say the cost of the land is that high because of the mud mining operation?

General Myers. That is right."

Regarding paragraph VI of the motion to dismiss, the defendants were harrassed by the Corps of Engineers; the Commanding Officer of the Air Base, General J. S. Holtoner, made a public statement that the defendants' property should be bombed; that the legal officer, Lt. Col. Marcus B. Sacks, stated that the defendants should be bombed. That Pancho Barnes attempted to have a legal paper served on General Holtoner by Constable Hodges and General Holtoner refused to allow himself to be served, whereupon service was made by one Clifford Morris, a civilian employed on the Base. Whereupon [98] Clifford Morris was disciplined, punished, and serious recriminations made against him. Clifford Morris was further frightened and intimidated by Lt. Col. Marcus B. Sacks. That General Holtoner assumed duties as Base Commander in relation to the condemnation of the defendants' land and greatly aggravated the defendants and that after his assumption of such duties, the defendants' income was materially depleted.

The defendants contend that their property was not taken legally under Public Law 564 of the 81st Congress.

If the Secretary of Air did authorize the condemnation suit and if the Assistant Secretary of Air Edwin V. Huggins did sign a declaration of taking for the subject property, it was done arbitrarily, capriciously, without adequate determining

principle and in bad faith, or was unreasoned and was in bad faith.

On February 26, 1953, General J. S. Holtoner did in violent rage threaten to get rid of the defendants. Did mention a condemnation suit and did threaten to bomb the defendants with napalm bombs.

On February 27, 1953, a complaint in condemnation was made up in the Lands Division of the U. S. Attorney's office at Los Angeles and signed and filed on that same day.

Also a certain paper purported to be a Declaration of Taking for the subject property was also filed on February 27, 1953.

The "Declaration of Taking" as filed is an obviously and completely made over document, obviously changed after it was signed by Edwin V. Huggins. It is a paper that originally appears to have been intended for another case. The case number was 1201-ND, which number was scratched out. The defendants' case No. 1253-ND written in probably at the time of filing. The acreage was 1,710.73 acres, which was x-ed out and changed to [99] 360 acres. The name of the defendants Ethel Petrovna Rice, et al., was x-ed out and E. S. McKendry, et al., added. The caption: "Declaration of Taking No. II" had the "No. II" x-ed out. On the second page, beginning at line 16—"and is a description of part of the lands in the amended complaint in condemnation filed in the above-entitled cause." The word "amended" is x-ed out; the phrase "part of the lands" does not fit, as all of the defendants' land was described in Schedule "A" attached.

The defendants have examined several dozen condemnation files and found no other slipshod or made-over documents. The defendants have shown their photostatic copy of their so-called "Declaration of Taking" to several attorneys and many other informed persons and all these people have unanimously agreed that the document is illegal, it has been described as "manufactured," "forged," and "fraudulent" by these authorities. If we can have our rights taken from us on such a document and if such document can be called "legal" or in any way condoned, then no one has any protection by or from any legal paper. Judge Beaumont even initialed a change on the carbon copy in his order and Opinion on defendants' case. **How about** changed documents in Wills—Contracts—Oil leases, etc.?

Dated: May 12, 1955.

Respectfully submitted,

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Defendants in Propria Persona.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause No. 1253-ND.]

SUPPLEMENT TO MOTION TO DISMISS IN-
CLUDING MORE DEFINITE STATE-
MENT

Come Now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court that the Complaint on file herein be dismissed for the following reasons:

I. That the Secretary of the Air Force and the Assistant Secretary of the Air Force acted arbitrarily and capriciously and without adequate determining principle, was unreasoned, and acted in bad faith when they instituted the condemnation suit.

(a) This allegation is based on the Public Records and specifically on the Committee meeting of the 81st Congress, Public Law 564, regarding Land for Base Expansion at Muroc.

(b) It is also based upon the maps and files of the District Engineer at Los Angeles as seen by the defendants.

II. That fraudulent misrepresentations were made to Congress regarding the properties to be condemned. [102]

This allegation is based on the incorrect information given the above referred to Congressional Committees by the Air Force lobbyists and by Congressman Johnson, who was obviously misled and influ-

enced by the local commanding officer. The defendants and their witnesses are experts on the town of Muroc, its vicinity, environs, and the area for miles around. The actual Congresssional Hearing is quoted in detail in the document filed May 12, 1955 entitled "Supplemental Specific Information, etc."

III. That Public Law 564, approved June 17, 1950, did not include the subject property, nor did any other Public Law as mentioned in the Complaint include said property.

Public Law 564 was the only authorization law purportedly pertaining to the subject property. Discussion was specific in the Congressional Hearings, the text is set forth in the "Supplemental Specific Information, etc.," filed May 12, 1955. It is clear that the subject property was not authorized by Congress, nor was the subject property asked for or even suggested by the Air Force lobbyists.

IV. That said property was not necessary to the expansion of the Edwards Air Force Base and no public use was intended or planned for the subject property.

This is a plain statement of fact. Maps of the Area will so prove its truth. Be it noted that a very heavily trafficed highway owned and maintained by Kern County is between the subject property and the fenced Air Base and is over two miles nearer the base than the subject property.

V. That this Court lacks jurisdiction of the con-

demnation suit because the property was obviously not included in the Statutes under which the Condemnation Suit was instituted.

In a pleading of bad faith, the Court has jurisdiction to determine the necessity of the taking of the property. In a [103] pleading of bad faith and lack of jurisdiction the Court has jurisdiction to determine whether or not the Court has jurisdiction. The Court is obligated to dismiss a Condemnation Suit which is improperly instituted and which is taken in violation of the Statutes purported to but which in actuality do not pertain to the subject property.

VI. That agents of the Air Force directed by higher headquarters and/or the Secretary of the Air Force, did so harrass the defendants, and did harm their business in attempts to discourage and sicken them to the point that they would be willing to leave and sell out without the benefit of the due process of law.

Colonel Leroy Cooper, the Judge Advocate of the Air Research and Development Command, did tell the defendants that General J. S. Holtoner had been sent to Muroc with specific orders to "get rid of" the defendants. Also, the actual findings in the case, where the defendant Pancho Barnes did sue General Holtoner and Lt. Colonel Sacks, Case No. 15403-C, indicate the truth of the above allegation. Not to be confused with the original "proposed" findings not signed by Judge Carter, but read to the Honorable Judge Jertberg on May 23, 1955 by At-

torney Joe McPherson, with the malicious intent of deceiving the Honorable Court.

VII. The Secretary of the Air Force has attempted to attain his ends without granting the defendants their rights under the Constitution and particularly the Fifth Amendment.

The Secretary of the Air Force and/or the Assistant Secretary of the Air Force have perpetrated the illegal taking of defendants' property. Have permitted the harrassment of the defendants without the benefit of statutory rights, without a legal estimate of just compensation, with a bogus ex-parte [104] judgment made before the defendants were even aware that a Condemnation suit, etc., was filed.

VIII. That the Secretary or the Assistant Secretary of the Air Force did take the subject property with intention for private use. The intent of taking for private use was two-fold. That while the Government did not have any military use intended or planned for the subject property, there was an obvious plan for the subject property for private use. This plan was two-fold: (a) The defendants were informed by General J. S. Holtoner that the personnel of the Air Base would use the subject property as it stood for private use and defendants believe that this intention would have been put into effect had not the defendants rigorously contested that the Air Base could not do this. Besides the "rigorous contention" the defendants did, with absolute legality, pull the two big water pumps sup-

plying water to the property, which did render the property waterless and therefore untenable. (b) That while no military use of the subject property was intended, the Air Force did intend to and did confiscate illegally all property not only in the vicinity of the Town of Muroc but for many miles to the North, South and West thereof. This was done so that no private business could remain within many miles, and so that the Air Force masquerading under the "Wherry Housing Act" could and has established a "Monopoly Town." This town is located on confiscated land, land that was condemned or was purchased under the threat of condemnation. This town, besides the Wherry Housing, is a complete "Monopoly Town." The roads, schools and library, etc., are supported by Kern County taxpayers. The renters of dwellings are forced to pay the Kern County property taxes on the buildings. The private individuals who have concessions, dealt out by favoritism, pay a 10% of their gross take with a minimum guarantee to the Hal B. [105] Hayes Corporation. The town is controlled, is a monopoly, is Un-American in its concept, and in violation of the Anti-trust laws. Had the Air Force not put all the local business people out of business, including the defendants, no such Communistic-like atrocity such as the community of Edwards could exist in America. The subject property was put out of business to help promote this "Monopoly Town." The defendants were never asked to consider taking a "concession" such as would replace their business and the same is true of

the other old businesses in the area. The Air Force made much ado that liquor stores could not be allowed on Government property, but the "Monopoly Town" of Edwards is complete, liquor and all.

IX. The Government has dogmatically refused to show the defendants any justification for the taking of their property. The defendants were briefly shown certain of the Engineers' files. The only justification therein was as of the 82nd Congress. There was nothing to show that the subject property was included. In fact, to the contrary. Be it remembered the subject property was taken under Public Law 564 of the 81st Congress. It is acknowledged legally that when documents are concealed or withheld that the Court may take cognizance that the documents would be adverse to the side withholding them. If this condemnation suit, etc., were strictly legal, would not the Government be happy to show their authorities? Yet, on the other hand, the Government has demanded minute and specific detail from the defendants, while at the same time the Government refuses to show their files, maps, etc. Is this a legal equity?

X. The Air Force did change over, and almost completely rebuilt, virtually the entire Air Base in a drastic and expensive manner. The defendants can find no authority or justification in Congress for this cataclysmic manipulation. The most definite authority, if any, would come under Public Law 564, [106] which law gave definite authority for runway, barracks, land, etc., with a total sum

of approximately \$26,000,000. The Air Force Base spent many more millions and the defendants are informed and believe that this wrongful expenditure greatly exceeded the amount authorized by Congress. That the Air Force has thus abused and exceeded the authority delegated to it by Congress. The manipulation of monies spent without proper frankness to Congress and proper appropriation has thrown a burden on all land owners in the appraisals and offers for land condemned, whether or not proper and legal justification were made.

XI. Should the Government made any claim for security, or that the Air Base is a "sensitive installation," let us state that the new highway leading from the northerly direction to the "Monopoly Town" of Edwards is so strategically situated for the benefit of any one who cares to drive over it that it overlooks, from a hill, the heart of the Air Base, when the goings-on may be observed with the naked eye or, should more detail be of interest, then field glasses would be of easy use.

XII. While the 300,000 acres that the Air Base now claims as their territory is of much acreage and many farms, etc. have been sacrificed, this acreage is of little consequence to a fast airplane. It is traversed in a question of seconds. As the "Monopoly Town" of Edwards "a fast growing community" is located closer to the Base proper, runways, etc. than the subject property. There is no attempt to confine dangerous experimental tests to their own territory. Heavens No! Why should

they jeopardize the Air Base when they have so many other Desert Communities and privately owned land to fly over. Their accident record, past, present and future, has and will prove that the taking of many thousands of acres and the destruction of hundreds of private uses of land has been, alas, [107] in vain.

This Supplemental Motion is based upon the Original Motion filed April 22, 1955 and upon the pleadings on file in the within action, and upon the Memorandum of Points and Authorities, and on such documents, affidavits, witnesses and arguments as may be offered in support of the Motion.

/s/ PANCHO BARNES,

Defendant in Propria Persona. [108]

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause No. 1253-ND.]

SUPPLEMENT IN ADDITION TO MOTION
TO SET ASIDE DECLARATION OF TAK-
ING AND TO VACATE AND SET ASIDE
EX PARTE JUDGMENT ENTERED
THEREON

Come Now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court to set aside the Declaration of Taking dated February 27, 1953, and to vacate and set aside the ex parte judgment entered thereon dated March 2, 1953 for the following reasons:

Now here include the original Motion as filed April 22, 1955 and consider Paragraphs I, II, III, and IV, and add as follows:

V. That the document entitled "Declaration of Taking," Case No. 1253-ND, United States of America, Plaintiff vs. 360 Acres of Land, in the County of Kern, State of California; E. S. McKendry, et al., with the word "Amended" Xed out and showing "part of the lands" in Schedule A, which document did not and does not apply to the defendants' subject property, be set aside for the following [109] additional reasons: That said document is a disgrace to the integrity of the Government. That it is a frightful thing that U. S. Citizens can be put out of business and their land taken from them, their birthright under our Government of life, liberty and pursuit of happiness, hindered, hampered and endangered by such a slipshod, haphazard, casual and messy document, which would not be considered a legal document in any deal from real estate to the purchasing of hogs. That the document on its face proves:

(a) That it is a changed document.

(b) That there is no indication as to when it was changed or who changed it.

(c) That on its face it plainly indicates that it is, fraudulent, manufactured or forged.

(d) That if the changes were made after the Assistant Secretary of the Air Force Huggins signed, he in effect did not sign it at all for the subject property and did not know of what the subject property consisted.

(e) That if the changes were made before the Assistant Secretary Huggins signed the document, that there is nothing to indicate that he approved the changes. That if he paid so little attention to the document then, he did not know what he was signing. If the changes were made before Huggins signed the document and he did not note and correct and/or initial same, he was negligent, incompetent, and unfit in his position. Such an entirely negligible document could not be considered a legal document. The defendants feel strongly that neither negligence nor fraud should be condoned on behalf of the Government. [110]

VI. That the estimate of just compensation was made knowingly in bad faith because the Government did not have sufficient funds to make a proper offer. The subject property was not asked for by the Air Force lobbyists and not fitting or sufficient appropriation was made, because the Air Force had no justification.

That the Secretary of the Air Force and/or the Assistant Secretary of the Air Force and/or "lower authority," for which "higher authority" is responsible, arbitrarily, capriciously, and in bad faith did make a so-called "Declaration of Taking" and did deposit a mere nominal sum constituting a non-compliance with the statute because there was no money appropriated for said property. The intention was plainly to put the burden of the value of the property on the defendants. Forcing them to be harrassed with court action and in turn throwing the responsibility upon the United States Treasury

to make up the cost of the property for which they had no appropriation.

The Air Force lobbyist General Colby M. Myers, in a memorandum to the Assistant Secretary of the Air Force dated December 27, 1950, did state "Approximately \$1,563,100. now available to cover first, second, and third priorities and possibly part or all of priority four." E. V. Huggins, Assistant Secretary of the Air Force, writes a letter to the Chief of Engineers and requests "certain priorities be established for the acquisition of this land (a) Land for the relocation of the railroad, (b) The Mud Mines."

An estimated cost: "New railroad right of way \$35,000." "Relocation cost for the railway and powerline \$5,695,000." "Acquisition of mineral interests and relocation of mud mines \$2,000,000." Note: Above figures gleaned from the files of the District Engineer.

This Supplemental Motion will be based upon the Motion that it supplements, filed April 22, 1955, and upon the [111] so-called "Declaration of Taking" on file and the "Decree on the Declaration of Taking," on testimony at the time of hearing; affidavits making a prima facie showing of non-compliance with the statute; exhibits proving bad faith in the manner of appraisal of the lands and building; and other and sundry documents in support of the motion.

/s/ PANCHO BARNES,

Defendant in Propria Persona. [112]

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause No. 1253-ND.]

MINUTES OF THE COURT

Date: June 6, 1955. At: Los Angeles, Calif.

Present: Hon. Gilbert H. Jertberg, District Judge.

Deputy Clerk: Louis Cunliffe. Reporter: Virginia Wright. Counsel for Gov't.: Laughlin E. Waters, U. S. Att'y., and Jos. F. McPherson and Richard A. Lavine, Ass't. U. S. Att'ys.

Counsel for Defendant: No appearance. Defendant Pancho Barnes present, in pro. per.

Proceedings: For hearing on plaintiff's motion to quash subpoena duces tecum.

Continued to 2 P.M. At 2 P.M. court reconvenes herein, and all being present as before, including def't. Pancho Barnes, in pro. per., and counsel for Gov't.;

Attorney McPherson makes a statement.

Def't. Pancho Barnes makes a statement.

At 3:30 P.M. court recesses. At 3:40 P.M. court reconvenes herein, and all being present as before,

Pancho Barnes resumes argument in pro. per.

Attorney McPherson argues.

Court Orders Gov't. motion to quash subpoena duces tecum Granted, and that Def't. Barnes be specific in designating documents in future subpoenas; Attorney McPherson to prepare formal order.

Court adjourns at 4 P.M.

JOHN A. CHILDRESS,
Clerk. [113]

[Title of District Court and Cause No. 1253-ND.]

OPPOSITION TO MOTION TO DISMISS AND
MOTION TO SET ASIDE DECLARATION
OF TAKING AND JUDGMENT THEREON

Comes now the United States of America, plaintiff herein, by Laughlin E. Waters, United States Attorney, and Joseph F. McPherson and Richard A. Lavine, Assistant United States Attorneys, for the Southern District of California, pursuant to authorization of the Attorney General of the United States, and denies all and singular, each and every, the material allegations of the motion to dismiss this proceeding and the motion to set aside the declaration of taking and judgment thereon, as supplemented and amended, and shows and represents unto this Honorable Court as follows:

I.

Edwards Air Force Base (formerly Muroc Air Force Base) is presently a special installation under the Air Materiel Command and, among other things, is the flight test station for all new aircraft being produced for the United States Air Force. [114]

II.

The mission of the Air Force Flight Test Center at Edwards Air Force Base is, among other things, to accomplish functional flight tests of complete manned aircraft weapon systems, including components and allied equipment; to conduct engineering

evaluation flight tests of aircraft and power plants; to accomplish static firing tests of guided missile power plants; to accomplish research and development related to such tests; to plan for, control and operate the experimental rocket engine test station, the USAF experimental flight test pilot school, Air Force flight test center track testing facilities, and other special test facilities, and to provide facilities and necessary services for contractors and other governmental agencies in support of the prescribed mission of the Air Research and Development Command.

III.

Edwards Air Force Base was established many years ago. Several enlargements of the area of the Base and changes in the mission and functions thereof have been authorized and undertaken. At present the base encompasses an area of approximately 300,000 acres being developed in accordance with a master plan approved in 1950.

IV.

So far as is material to this proceeding, the enlargement of Edwards Air Force Base, involving among others this condemnation, results from the determination of necessity made by the Secretary of the Air Force under and pursuant to, among others, the Act of June 17, 1950, Public Law 564, 81st Cong. (64 Stat. 236 at 242); the Act of July 26, 1947, codified in part at 10 U.S.C. 1343(a), (b) and (c), 5 U.S.C. 171, and 50 U.S.C. 401 et seq.; the Acts of July 2, 1917 (40 Stat. 241) and April 11,

1918 (40 Stat. 518), 50 U.S.C. 171; and the Act of August 1, 1888. [115]

V.

Specific authorization to acquire the lands necessary to effectuate the determination of the Secretary of the Air Force, aforesaid, and the appropriation of funds required for that purpose is found in the Act of June 17, 1950, Public Law 564, 81st Cong. (64 Stat. 236 at 244); the Act of September 6, 1950, Public Law 759, 81st Cong. (64 Stat. 595 at 748), the Act of January 6, 1951, Public Law 911, 81st Cong. (64 Stat. 1223 at 1233); and the Act of January 6, 1951, Public Law 910, 81st Cong. (64 Stat. 1221 at 1223).

At the time Public Law 564, 81st Congress, *supra*, was enacted, the area of the Base was approximately 160,000 acres. The additional area necessary to be acquired, in the opinion of the Secretary of the Air Force as submitted to the 81st Congress, was 139,000 acres which, together with the lands previously owned, including public domain, aggregate the 300,000 acres presently within the boundaries of the station, all of which has been authorized, approved, and appropriated for by the Congress of the United States in the usual and customary manner.

VI.

At the time the declaration of taking assembly was submitted to and approved by the Secretary of the Air Force he had before him an appraisal of the subject property prepared by an experienced, qualified contract appraiser who had determined the

fair market value to be \$205,000. The Secretary of the Air Force did not have any other or contrary appraisals, and his estimate of the just compensation required by 40 U.S.C., section 258a, which he determined upon and caused to be deposited in the registry of the court is the sum of \$205,000, the full amount of the contract appraisal. [116]

VII.

Reserving the right heretofore asserted in this case respectfully to dispute the power and authority of this court to consider or pass upon the issue of necessity raised by the defendants' motions in connection with the allegation that no public use was contemplated or intended, the plaintiff alleges that the sole and only purpose in acquiring the defendants' property was for the enlargement and development of Edwards Air Force Base, a military installation, as hereinbefore described, and for no other purpose, and that the use which has been and will be made of the property condemned is purely and solely military in nature, and is in no sense private.

VIII.

The plaintiff, its officers and agents, particularly those named in the defendants' motions and affidavits and in testimony heretofore taken, have not been guilty of any harassment of the defendants. The truth of this allegation having been several times established by judgments and orders of this court, judicial notice will be taken of them and they are the law of this case.

IX.

The condemnation of Tracts L-2040, L-2043, L-2071, and L-2072, comprising approximately 360 acres of land purportedly owned by the defendants herein, by a separate independent action rather than by way of amendment of the action then and now pending undetermined in this court entitled "United States v. 1,710.73 acres of land in the County of Kern, State of California; Ethel Petrovna Rice, et al.," numbered 1201-ND, was undertaken pursuant to the express authorization and direction of the Acting Assistant Attorney General of the United States in charge of the Lands Division, Department of Justice, effectuating the request for acquisition of said parcels by condemnation, executed at the [117] direction of the Secretary of the Air Force by the Honorable E. V. Huggins, Assistant Secretary of the Air Force, dated February 3, 1953. This action has been ratified, approved and confirmed.

X.

The plaintiff does not consider any other allegations or purported allegations of the motions, as supplemented and amended, to tender issuable facts and no note is taken of them. If any or either thereof should be determined to be material, the plaintiff prays leave of court for a reasonable opportunity to traverse them and to offer proof as to the truth in relation to such allegations.

UNITED STATES OF AMERICA,
LAUGHLIN E. WATERS,
United States Attorney,

JOSEPH F. McPHERSON,

Assistant U. S. Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

/s/ By JOSEPH F. McPHERSON,

Attorneys for Plaintiff. [118]

Affidavit of Service by Mail Attached. [119]

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause No. 1253-ND.]

AFFIDAVIT OF RICHARD A. LAVINE RE
FILES OF UNITED STATES ATTOR-
NEY'S OFFICE

State of California,
County of Los Angeles—ss.

Richard A. Lavine, being first duly sworn, deposes and says as follows:

I am an Assistant United States Attorney, and am assigned to the Lands Division of the United States Attorney's Office for the Southern District of California. I am one of the attorneys responsible, at the present time, for the handling of the above entitled case.

I have examined the official office files of the United States Attorney's Office pertaining to the above entitled case, and found therein the documents as set out below. True photostats of such documents are attached hereto and incorporated herein as though at length set forth. [120]

1. Letter of 8 December 1952, from District Engineer to Walter S. Binns, United States Attorney, together with two copies of the enclosures, namely, letter of 4 December 1952 from W. R. Shuler, District Engineer, to Division Engineer, South Pacific Division; and Report of Negotiations, dated 4 December 1952 from J. L. Maritzen.

2. Certified copy of letter of February 3, 1953, from E. V. Huggins, Assistant Secretary of the Air Force, to the Attorney General.

3. Letter of February 5, 1953, from James M. McInerney, Assistant Attorney General, to Walter S. Binns, United States Attorney.

4. Carbon copy of letter of February 20, 1953, from Walter S. Binns, United States Attorney, to Lands Division, Department of Justice.

5. Letter of 20 February 1953 from J. L. Maritzen, Chief, Acquisition Branch, Real Estate Division, Office of District Engineer, to Walter S. Binns.

6. Carbon copy of letter of February 24, 1953, from Walter S. Binns, to District Engineer.

7. Telegram of February 25, 1953, from J. Edward Williams, Acting Assistant Attorney General, to Walter S. Binns.

8. Carbon copy of letter of February 27, 1953, from Walter S. Binns to Lands Division, Department of Justice.

9. Carbon copy of letter of March 3, 1953, from

Walter S. Binns to Lands Division, Department of Justice.

10. Carbon copy of letter of March 4, 1953, from Walter S. Binns to District Engineer.

11. Carbon copy of letter of March 18, 1953, from Walter S. Binns to District Engineer.

12. Carbon information copy of a letter of 24 March 1953 from Harold E. Spickard, Chief, Real Estate Division, Office of [121] District Engineer, to Division Engineer, South Pacific Division.

13. Letter of April 22, 1953, from J. Edward Williams, Acting Assistant Attorney General, to Walter S. Binns.

14. Telegram of September 14, 1953, from Perry W. Morton, Assistant Attorney General, to Laughlin E. Waters, United States Attorney.

In addition, I have procured for our files a copy of a letter dated March 17, 1953, from the Attorney General to the Secretary of the Air Force, copy of which had been forwarded to the Division Engineer, South Pacific Division. A copy of said letter is attached hereto and incorporated herein as though at length set forth.

/s/ RICHARD A. LAVINE.

Subscribed and sworn to before me this 6th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk, United States District Court, Southern District of California,

/s/ By L. B. FIGG,
Deputy. [122]

EXHIBIT No. 1

Corps of Engineers, U. S. Army
Office of the District Engineer
Los Angeles District
751 South Figueroa Street
Los Angeles 17, California

8 December 1952

Refer to File No. SPLRA 601.1 (Edwards AFB
—Tracts L-2040, L-2043, L-2071 and L-2072)
(Pancho Barnes tracts.)*

Mr. Walter S. Binns
United States Attorney
Department of Justice
807 Federal Building
Los Angeles 12, California

Re: U. S. vs. 1,710.73 Acres of Land, in the
County of Kern, State of California; etc.— Civil
1253

1201-ND.

Herewith for your advance information is copy
of Declaration of Taking Assembly submitted by
this office.—(On Pldg's Board.)*

For the District Engineer:

Very truly yours,

/s/ J. L. MARITZEN,

Chief, Acquisition Branch,
Real Estate Division.

1 Incl

cy D/T Assy.

(~~It will be necessary to Amend Comp.~~ See Report
of negotiations to date att. hereto.)* [123]

* Pencil writing.

[Stamped]: Received Dec. 9, 1952.

Exhibit No. 1—Continued)

Splra 601.1 (Edwards Air Force Base, California.
Tracts L-2040, L-2043, L-2071 and L-2072).

(4 December 1952) Handwritten Initialed RAL
Declaration of Taking No. 2 Covering Tracts
L-2040, L-2043, L-2071 and L-2072, Edwards Air
Force Base, California.

Division Engineer
South Pacific Division
Corps of Engineers, U. S. Army
P. O. Box 3339, Rincon Annex
San Francisco 19, California

1. Reference is made to Teletype SPDRC 719 from your office, dated 1 December, 1952, authorizing submission of Declaration of Taking assembly on subject tracts, which are owned of record by E. S. McKendry, et al., but which are purportedly owned by Mrs. Pancho (Barnes) McKendry, and also to the voluminous previous correspondence relative to the acquisition of these four tracts, which are known in the project as the Rancho Ore Verde.

2. Inclosed is Declaration of Taking assembly covering these tracts, in which the declaration is identified as Declaration of Taking No. 2 in Condemnation Case No. 1201-ND Civil. The land described in the Declaration of Taking is not presently embraced by said condemnation action and will require amendment to include Tracts Nos. L-2040, L-2043, L-2071 and L-2072 therein.

3. The owners, through their ostensible representative, Pancho Barnes McKendry, have refused to

Exhibit No. 1—Continued)

accept the appraised valuation of these four tracts in the aggregate amount of \$205,000.00, and she firmly expressed such refusal on numerous occasions to myself and to the member of my staff whom I delegated to negotiate the acquisition of these tracts. Correspondence in our files reveals that Mrs. McKendry values these four tracts at between \$1,500,000.00 and \$3,000,000.00. No options have been obtained and a detailed report of negotiations as to the four tracts is included in the Report of Negotiations inclosed herewith, which also includes the information required by (Illegible), Orders and Regulations. Appraisals by Bernard C. Evans, Fee Appraiser, have heretofore been approved by your office and Office, Chief of Engineers, in the following amounts as to each of subject tracts:

Tract L-2040—\$ 33,500.00

Tract L-2043—\$ 29,000.00

Tract L-2071—\$ 2,000.00

Tract L-2072—\$140,500.00

Copies of these appraisals and also the title certificates are available in this office for delivery to the Department of Justice as soon as requested by its local office.

4. The Real Estate Planning Report dated 1 May 1950 recommending a Lease with Option Plan, was transmitted by Office, Chief of Engineers to Headquarters, Air Forces on 26 May 1950. However, the records of this office do not show the date of approval by Office, Chief of Engineers of the

Exhibit No. 1—Continued)

Planning Report other than as such approval is indicated by letter from Office, Chief of Engineers, dated 19 January 1951 transmitting Real Estate Directive (Illegible) to your office. Subject tracts are within the taking line approved for this project, and the estate to be acquired in said tracts, i. e., fee simple title, is in conformance with the estate authorized by Directive (Illegible) dated 10 January 1951.

5. Possession of all four tracts may be required immediately by Edwards Air Force Base, and it is therefore recommended that the Attorney General be requested to instruct his local representative to seek from the court an Order for Immediate Possession of all four tracts upon request to the local representative of the Department of Justice by this office.

6. Your attention is invited to the format of the Declaration of Taking, which, being on ruled and numbered paper, double spaced, with the caption commencing on line 8, conforms to the rules of the United States District Court as to its requirements for documents and other papers to be filed with the Court Clerk of the Southern District of California. It is recommended that in the event it is found necessary to rewrite any part of the inclosed declaration that the format of the inclosed document be preserved.

7. Funds are available in this office Under Allotment No. (Illegible), for the deposit in Court of the

Exhibit No. 1—Continued)

estimated compensation in the amount of \$205,000.00.

8. It is urgently recommended that the processing of the inclosed Declaration of Taking not be unduly delayed for the reason that many owners whose properties have already been taken by Declaration of Taking heretofore filed in Condemnation Cases Nos. 1201, 1200, 1163, and 1147, have registered complaints with the Department of Justice and this office that favoritism is being shown by the Government by delay in acquiring subject tracts, although these tracts are closer to the existing Edwards Air Force Base Project.

W. R. Shuler
Colonel, Corps of Engineers
District Engineer

2 Incls

1. D/t Assembly (12 copies)
2. Report of Negotiations (12 copies) [126]

Report of Negotiations

For Tracts Nos. L-2040, L-2043, L-2071 and L-2072
Edwards Air Force Base, California

1. Under instructions from Colonel Shuler, the undersigned made an appointment to discuss with Mr. and Mrs. E. S. McKendry (Pancho Barnes), the subject of acquiring their property. Appointment was made for 5:30 p.m., 21 August 1952, at their residence in Muroc, California. The meeting lasted for a period of approximately 8 hours, due to

Exhibit No. 1—Continued)

interruptions, but at no time during this meeting was the writer left without the presence of either Mr. McKendry or Miss Pancho Barnes, and every courtesy was extended to the undersigned during the discussion and review of procedures followed in the acquisition of property by the Government.

2. Based upon the approved appraisal, an offer was made in the amount of \$205,000.00, and this offer was, as expected, rejected, as she feels that the value of her property far exceeds the offer made.

3. During our meeting, it was apparent that Miss Pancho Barnes was very well versed and enlightened on matters pertaining to the Edwards Air Force Base, its operations, and as well, several other Air Force projects in this area, including Palmdale Air Force Base.

4. Miss Barnes was very emphatic in making the statement that her property was not needed for the project, and especially not at this time, nor in the immediate future.

5. If the rejection of our offer results in a condemnation action being filed, and an application made for possession, the undersigned feels that Pancho Barnes will contest such action on the following grounds:

a. That the value as established by the appraisal does not represent a fair market value.

b. That the property is not needed for the project.

Exhibit No. 1—Continued)

c. That there is no necessity for an Order for Possession being granted for the reason that her property is not needed at this time, nor in the immediate future.

d. That her business produces an annual income of better than \$100,000.00 from the many operations which she has on her rancho.

e. That there is no reason why she cannot continue operations, especially in view of the fact that the Air Forces has tentatively agreed to allow the Mojave Corporation to continue operating their mud mines for another year.

6. Miss Barnes also contends that in appraising her property, the furniture in the motel, or rooms, and equipment in the cafe, cocktail lounge, and dance hall, should be included in the appraisal, as she sees no reason for her being compelled to be in the second-hand furniture business.

7. Miss Barnes having alleged a value of between \$1,500,000.00 and \$3,000,000.00 for these four tracts in previous correspondence with this office, and having refused to accept the appraised valuation of \$205,000.00, results in the conclusion that acquisition of these four parcels must be by condemnation, leaving the amount of just compensation to be determined at a trial of the matter in the United States District Court.

Dated: 4 December 1952.

/s/ J. L. MARITZEN,

Chief, Acquisition Branch,
Real Estate Division. [127]

EXHIBIT No. 2

Feb. 3, 1953

Dear Mr. Attorney General:

Reference is made to the pending condemnation proceeding entitled United States vs. 1710.73 acres of land, more or less, situate in Kern County, State of California, and Ethel Petrovna Rice, et al., Civil No. 1201-ND, instituted to acquire land for use in connection with the Edwards Air Force Base Project, California.

Pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C. Section 258a), and the Acts of Congress recited in the complaint filed in the above entitled proceeding, it is requested that you cause the enclosed Declaration of Taking No. 2 to be filed in said proceeding for the condemnation of the fee simple title to 360 acres of land, more or less, as described in the declaration of taking. The estate to be acquired in the land, the description thereof, and the names and addresses of the purported owners are set forth in said declaration of taking. The sum estimated to be just compensation for the taking of the interests in the land is \$205,000, a check for which amount will be made available to your field representative by the District Engineer, Los Angeles District, Corps of Engineers, Los Angeles, California, for deposit into the registry of the court with the filing of the declaration of taking.

The Act of Congress approved September 6, 1950 (Public Law 759 — 81st Congress), appropriated

Exhibit No. 2—(Continued)

funds to acquire the interests under consideration.

The lands described in the enclosed declaration of taking are not included in the pending condemnation proceeding. It is, therefore, requested that prior to the filing of the enclosed declaration of taking you take the necessary action to amend the complaint and other pleadings on file in the proceeding so as to include the 360 acres of land referred to above and set forth in the enclosure hereto.

The aforementioned land is required for military purposes and possession of the land is required for construction purposes. Therefore, it is requested that an order be procured from the court upon the request of the District Engineer to your field representative granting possession of the land immediately to the United States of America. [128]

Title evidence and appraisal reports will be furnished your field representative by the District Engineer.

It is requested that copies of the complaint and order of possession as amended be furnished to the Assistant Chief of Engineers for Real Estate and the District Engineer.

Three additional copies of the declaration of taking are enclosed.

By direction of the Secretary of the Air Force:

/s/ E. V. HUGGINS,

Assistant Secretary of the Air
Force.

Exhibit No. 2—(Continued)

I certify this to be a true copy of the original record in my custody.

/s/ JAMES M. McINERNEY,

Assistant Attorney General, Lands
Division, Dept. of Justice.

Enclosure

The Honorable

The Attorney General [129]

EXHIBIT No. 3

United States

Department of Justice

Washington 25, D. C.

RJL-CMacM

33-5-1668-284

February 5, 1953

Air Mail

Walter S. Binns, Esquire

United States Attorney

807 Federal Building

Los Angeles 12, California

Dear Mr. Binns:

Re: Lands Division Matters

Enclosed is a certified copy of a letter dated February 3, 1953, from Honorable E. V. Huggins, Assistant Secretary of the Air Force, to the Attorney General, requesting the amendment of the condemnation proceeding entitled United States v. 1,701.73 Acres of Land, in the County of Kern, State of California, etc., et al., Civil No. 1201-ND, and the filing

Exhibit No. 3—(Continued)

of Declaration of Taking No. 2, together with an original and two copies thereof.

Please prepare and file an amended complaint including the additional land described in the enclosed Declaration of Taking No. 2, file the declaration and obtain the entry of a decree thereon providing for immediate possession of the land. A check in the amount of \$205,000.00, representing the estimated compensation, will be made available by the District Engineer for depositing into the registry of the court.

Title evidence and appraisal reports covering the additional land being taken are being procured by the District Engineer and will be furnished you when available.

When the foregoing action has been taken, kindly furnish the Department with two copies of the amended complaint and the decree on Declaration of Taking No. 2, one set of which should be certified, together with the duplicate original receipts of the clerk of the court showing the deposit of the estimated compensation.

Sincerely,

/s/ JAMES M. McINERNEY,

James M. McInerney,

Assistant Attorney General.

Received Feb. 9, 1953, Los Angeles, Calif.

Enclosure

No. 188066 [130]

EXHIBIT No. 4

AW:imc

1201-ND

February 20, 1953

Air Mail

Lands Division

Land Acquisition Section

Department of Justice

Washington 25, D. C.

Re: United States v. 1,701.73 Acres of Land in
Kern County, California, etc., et al. No. 1201-ND
Civil.

Your reference: RJL-CMacM 33-5-1668-284

Gentlemen:

Reference is made to your airmail letter under date of February 5, 1953, enclosing certified copy of letter from the Assistant Secretary of the Air Force, together with original and two copies of proposed Declaration of Taking No. 2, by which you instruct this office to file an amended complaint in the above-entitled action to acquire additional land for the Edwards Air Force Base in the County of Kern, State of California. The District Engineer has today delivered to this office a check in the sum of \$205,000, representing the estimated compensation for the land described in the Declaration of Taking.

Under date of February 10, 1953, the District Engineer forwarded to this office advance copy of a proposed Declaration of Taking Assembly No. 3 for the acquisition of fourteen additional tracts.

Exhibit No. 4—(Continued)

Your attention is invited to the fact that in both instances the acquiring agency requests the acquisition of the additional lands by amendment of the complaint in a pending action (Civil 1201-ND). It is therefore probable that by the time an amendment to include the property covered by Declaration of Taking No. 2 has been secured, a request for an amendment will be forthcoming to include property covered by Declaration of Taking No. 3. [131]

This entails a considerable amount of additional paper work and consumption of time, which would be obviated by the filing of a new action for the additional property sought to be taken rather than by the amendment of an existing action. The filing of a new action, when necessary, would simplify, to a large extent, the processing of the cases and negotiations for settlement.

The taking of the property in the Declaration of Taking No. 2, referred to in your letter of February 5, is almost certain to involve a bitter contest on the issue of value. The owner of this property has already pending suits against the Government for well over a million dollars. And the property included in the proposed Declaration of Taking No. 3 differs so widely in character (involving commercial mud mine deposits) from that taken in the original action, that a separate, independent action would greatly facilitate processing in this office.

It would be appreciated if you would discuss this problem with Mr. McPherson, who is now in Washington on other business, and authorize this office

Exhibit No. 4—(Continued)

to file new and independent actions for the additional lands sought to be acquired rather than by an amendment to the pending action. Please advise us by airmail or telegram of your determination hereon after Mr. McPherson has had an opportunity to discuss the matter with you.

Respectfully,

Walter S. Binns,
United States Attorney. [132]

EXHIBIT No. 5
Corps of Engineers, U. S. Army
Office of the District Engineer
Los Angeles District
751 South Figueroa Street
Los Angeles 17, California

Refer to File No. SPLRA 601.1 (Edwards Air Force Base — Tracts Nos. L-2040, L-2043, L-2071 and L-2072).

20 February 1953

Mr. Walter S. Binns
United States Attorney
Department of Justice
807 Federal Building
Los Angeles 12, California

Re: U. S. vs. 1,710.73 Acres of Land, in the County of Kern, State of California; etc., et al. Civil No. 1201-ND.

Dear Sir:

Inclosed is United States Treasurer's Check in

Exhibit No. 5—(Continued)

the amount of \$205,000.00, being the amount of estimated compensation to be deposited with Declaration of Taking No. 2 in Condemnation Case No. 1201-ND Civil as to Tracts Nos. L-2040, L-2043, L-2071 and L-2072.

Kindly advise this office of the date of deposit of the check in the registry of the Court and the date of the filing of the Declaration of Taking in order that our required report to higher authority may be made.

Inclosed are two copies each of the Preliminary Title Certificates as to each of the above listed tracts. Upon being advised by your office that the Decree on Declaration of Taking has been recorded in Kern County, this office will cause a Certificate of Inspection to be made as to these tracts, and also order Continuation Title Certificates dated through the recordation date of the Decree on Declaration of Taking.

This office has been instructed by higher authority that an Order for possession of subject tracts is not to be requested at the time of filing the Declaration of Taking for the reason that determination of the date that possession is required is to be determined at a later date. Upon such determination appropriate request to your office to seek an Order of Possession will be made by this office.

This office has been advised that the request for inclusion of the land described in Declaration of Taking No. 2 in Condemnation Case No. 1201-ND

Exhibit No. 5—(Continued)

Civil, together with a request for the filing of the Declaration of Taking, was forwarded by the Assistant Secretary of the Air Force to the Attorney General on 3 February 1953. In the event you do not yet have your authority to file the declaration of taking and include the land described therein in Condemnation Case No. 1201-ND, it is requested that telephone inquiry be made by your [133] office of the Attorney General as to whether or not such instructions have been dispatched to your office on this matter.

Kindly acknowledge receipt of the inclosures on the extra copy of this letter and return to this office.

For the District Engineer:

Very truly yours,

/s/ J. L. MARITZEN,

J. L. Maritzen,

Chief, Acquisition Branch, Real
Estate Division.

Received Feb. 20, 1953. Los Angeles, Calif.

Check Recorded 2-20-53. M.C.

5 Incls

1. U.S. Treas. Ck.
2. Cert. L-2040 (dup)
3. Cert. L-2043 (dup)
4. Cert. L-2071 (dup)
5. Cert. L-2072 (dup)

[134]

EXHIBIT No. 6

AW:JW

No. 1201-ND

February 24, 1953

District Engineer
Los Angeles District
Corps of Engineers
P. O. Box 17277, Foy Station
Los Angeles 17, Calif.

Attention: J. L. Maritzen, Chief, Acquisition
Branch, Real Estate Division.

Re: U.S. v. 1701.73 Acres of Land in the County
of Kern, etc., et al. No. 1201-ND. Edwards Air
Force Base. Tracts Nos. L-2040, L-2043, L-2071 &
L-2072.

Dear Mr. Maritzen:

This acknowledges receipt of United States Treas-
urer's Check in the amount of \$205,000 to be depos-
ited with a Declaration of Taking as to Tracts Nos.
L-2040, L-2043, L-2071 and L-2072, together with
two (2) copies of the Preliminary Title Certificate
as to each of the above listed tracts.

We also acknowledge receipt of the Declaration
of Taking designated as "Declaration of Taking
No. 2" in Civil No. 1201-ND, signed by Edwin V.
Huggins, Assistant Secretary of the Air Force.

In this connection reference is made to previous
conversations with personnel of your office in which
the desirability of acquiring the above numbered
tracts by the filing of a new and independent con-
demnation proceeding, was discussed. As you are

Exhibit No. 6—(Continued)

undoubtedly aware, the acquisition of the above designated tracts will involve bitter and protracted litigation on the issue of value. The owner of these tracts has already filed suits against the Government in connection with this property for well over one million dollars. The amendment of the pending action (No. 1201-ND) by the inclusion of the subject tracts calls for much additional paper work in this office and a consequent expenditure of unnecessary time which could be entirely obviated by the filing of a separate action. [135]

Moreover, you have already advised us by forwarding an advance copy of a proposed Declaration of Taking assembly No. 3 for the acquisition of 14 additional tracts. This means that if successive amendment to a pending action to bring in additional tracts are to be filed, the amendment of No. 1201-ND to bring in the tracts above referred to would hardly be accomplished before a further amendment would be required to bring in the 14 additional tracts. This is productive of the possibility of unnecessary and endless confusion.

It is noted that the property included in the proposed Declaration of Taking No. 3 differs so widely in character, involving commercial mud mine deposits, from that taken in the original action that a separate, independent action would greatly facilitate the processing of the condemnation proceeding in this office and simplify the process of negotiation for settlement of the tracts taken in the original

Exhibit No. 6—(Continued)

action, without complicating the case by including tracts which are almost certain to be litigated.

The procedure above suggested, i.e., the filing of separate actions embracing the tracts described in Declaration of Taking No. 2 and in Declaration of Taking No. 3, is in line with that heretofore followed in this acquisition. There are already pending four actions affecting property to be taken for the Edwards Air Force base, namely, Nos. 1133-ND, 1147-ND, 1200-ND and 1201-ND.

This office has called the attention of the Attorney General to the desirability of making the additional tracts now to be taken, the subject of separate and independent actions for the reasons above stated. It will be appreciated if you will concur in our recommendation and transmit to your higher authority such recommendation with a request that the Attorney General be advised that these additional tracts affected by Declarations of Taking Nos. 2 and 3, may be acquired by the filing of separate actions if it seems desirable so to do.

Your co-operation in this regard will be greatly appreciated.

Respectfully,

Walter S. Binns,

United States Attorney. [136]

EXHIBIT No 7

U IILA CLR Telegram

209 LA WA /J-D/

Washington DC 2-25-53 759P

Walter S. Binns

US Atty 807 Fedl Bldg LA

Reurlet February 20 Civil 1201ND. Satisfactory to institute new case covering land declaration taking 2.

J Edward Williams ACTG Asst Atty General
20 1201ND 2. CD/812 P.

Received Feb. 26, 1953. Lands Division, Los Angeles, California.

(Auth to file separate suit.) Handwritten

EXHIBIT No. 8

AW:JW

No. 1253-ND

Air Mail February 27, 1953

Lands Division,
Land Acquisition Section,
Department of Justice,
Washington 25, D. C.

Re: U. S. v. 360 Acres of Land in the County of Kern, Calif., etc., et al. No. 1253-ND. Expansion of Edwards Air Force Base—Army. Your reference: 33-5-1668-284.

Gentlemen:

Reference is made to your letter under date of February 5, 1953 and to your telegram of February

25, 1953, concerning the acquisition of additional land for the Edwards Air Force Base.

Please be advised that a Complaint in Condemnation, numbered 1253-ND Civil, was this day filed to take and condemn the four additional tracts described in the Declaration of Taking, and that simultaneously therewith the Declaration of Taking was filed and check No. 71342 of the Treasurer of the United States in the sum of \$205,000, was deposited into the registry of the Court.

The initial transcript will be forwarded to you as soon as the documents comprising the initial transcript can be prepared.

Respectfully,

Walter S. Binns,
United States Attorney. [138]

EXHIBIT No. 9

AW:JW

No. 1253-ND

March 3, 1953

Lands Division,
Land Acquisition Section,
Department of Justice,
Washington 25, D. C.

Re: U. S. v. 360 Acres of Land in the County of Kern, State of California, etc., et al. No. 1253-ND. Expansion of Edwards Air Force Base — Army. Your reference: 33-5-1668-284.

Gentlemen:

Supplementing my letter of February 27, 1953,

informing you of the filing of the above entitled condemnation proceeding, you will find enclosed herewith the following documents, comprising the initial transcript:

Certified and plain copy of Complaint.

Certified and plain copy of Decree on Declaration of Taking.

Duplicate original Certificate of the Clerk evidencing the deposit of \$205,000.

A certified copy of the Decree on the Declaration of Taking has been forwarded to the County Recorder of Kern County, California, for recordation.

You will be kept advised of further progress in this matter.

Respectfully,

Walter S. Binns,

United States Attorney. [139]

Encs.

EXHIBIT No. 10

AW:JW

No. 1253-ND

March 4, 1953

District Engineer,
Los Angeles District,
Corps. of Engineers,
P. O. Box 17277, Foy Station,
Los Angeles 17, Calif.

Attention: J. L. Maritzen, Chief Acquisition
Branch Real Estate Division.

Re: U. S. v. 360 Acres of Land in the County of

Kern, etc., et al. No. 1253-ND. Tracts L-2040, L-2043, L-2071 and L-2072. Edwards Air Force Base.

Dear Mr. Maritzen:

Enclosed herewith you will find copy of a Complaint filed February 27, 1953 in the above entitled action covering the four tracts owned by E. S. McKendry and Florence Lowe Barnes McKendry and others. Also enclosed is a copy of the Decree on the Declaration of Taking which was filed and entered March 2, 1953.

In preparing instructions for the Marshal to serve the defendants in this action, it appears that our files do not disclose an address for Benjamin C. and Kathryn May Hannam, record owners of Tract L-2071. Do you have their address in your records? If so, it would be appreciated if you would supply it to us.

Respectfully,

Walter S. Binns,

United States Attorney. [140]

Encs.

EXHIBIT No. 11

AW:JW

No. 1253-ND

March 18, 1953

District Engineer,
Los Angeles District,
Corps of Engineers,
P. O. Box 17277, Foy Station,
Los Angeles 17, Calif.

Attention: Mr. Wm. M. Curran, Attorney. Acquisition & Claims Branch Real Estate Section.

Re: U. S. v. 360 Acres of Land in the County of Kern, etc., et al. No. 1253-ND.

Dear Mr. Curran:

Pursuant to your telephonic request, enclosed herewith you will find an original and copy of the corrected first page of the Declaration of Taking filed in the above entitled action. This page was not re-written, just corrected.

On March 4, 1953 a conformed copy of the Decree on the Declaration of Taking was forwarded to you. A certified copy of the Decree was recorded March 5, 1953, in Book 2046, page 578, Official Records, Kern County.

Very truly yours,

Walter S. Binns,
United States Attorney. [141]

Encs.

EXHIBIT No. 12

SPLRA 601.1 (Edwards AFB—Condemnation
Case No. 1253-ND)

24 March, 1953

Corrected Declaration of Taking

Division Engineer
South Pacific Division
Corps of Engineers, U. S. Army
P.O. Box 3339, Rincon Annex
San Francisco 19, California

Inclosed are two copies of the corrected first page of Declaration of Taking filed in the above entitled action. This page was not re-written, just corrected, by the local office of the Lands Division, Department of Justice.

For The District Engineer:

Harold E. Spickard,
Chief, Real Estate Division.

1 Incl.

Corr. Pg#1 of D/T (dup)

cc: Walter S. Binns, U. S. Atty.

Att: Mr. A. Weymann [142]

EXHIBIT No. 13

United States
Department of Justice
Washington 25, D. C.

RJL:CMacM

33-5-1668-560

April 22, 1953

Walter S. Binns, Esquire
United States Attorney
807 Federal Building
Los Angeles 12, California

Dear Mr. Binns:

Re: Lands Division Matters.

Reference is made to the condemnation proceeding entitled United States v. 360 acres of land in Kern County, California, et al., Civil No. 1253-ND.

A review has been made of the appraisal report, prepared by Mr. Bernard G. Evans for the Department of the Army, covering the property included in the above-mentioned proceeding. The appraisal appears to have been satisfactorily prepared. However, unless an offer of settlement in the neighborhood thereof can be obtained in the near future, it is suggested that an additional appraisal be obtained in order that the Government may be adequately prepared for trial.

Your recommendation in the foregoing matter will be appreciated and upon receipt of the usual Form 25B for the preparation of an additional appraisal, prompt action thereon will be taken.

Sincerely,

/s/ J. EDWARD WILLIAMS,

Acting Assistant Attorney General.

Received April 27, 1953, Lands Division, Los Angeles, California.

EXHIBIT No. 14

[Telegram]

451 LA WA /J-D/

Washington 9-14-53 538P

Laughlin E. Waters

U. S. Atty., 807 Federal Bldg. L.A.

Rerulet September 9 Civil 1253ND. Oppose Motions to Dismiss and Set Aside Declaration of Taking. Move to quash subpoena. Authorities will be airmailed prior hearing. Advise whether Order of Possession requested August 18 obtained.

Perry W. Morton, Asst. Atty. General.

Received Sept. 15, 1953. Lands Division, Los Angeles, California.

9 1253ND 18

OHS 555P/HC 739P [144]

March 17, 1953

RJL:CMacM

oak

33-5-1668-560

Honorable Harold E. Talbott

Secretary of the Air Force

Washington, D. C.

My Dear Mr. Secretary:

I have examined the complaint, the declaration

of taking and the decree on declaration of taking in the condemnation proceeding entitled *United States of America v. E. S. McKendry, et al.*, Civil No. 1253-ND in the United States District Court for the Southern District of California concerning the acquisition of 360 acres of land in Kern County, California, designated as Tracts L-2040, L-2043, L-2071 and L-2072 of the Edwards Air Force Base.

The land is more fully described in the decree on declaration of taking.

The sum of \$205,000.00 was deposited into the registry of the court as the estimated compensation at the time of the filing of the declaration of taking.

From my examination of the above-mentioned documents, I find that a valid title vested in the United States of America on February 27, 1953, to said land, pursuant to the provisions of an Act of Congress approved February 26, 1931 (46 Stat. 1421), subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

Enclosed are certified copies of the complaint in condemnation and the decree on declaration of taking, together with the clerk's receipt showing the deposit of the estimated compensation.

Sincerely yours,

Attorney General.

Enclosure

No. 68249

Div. Engr.—South Pacific Division.

[Endorsed]: Filed June 17, 1955. [145]

[Title of District Court and Cause No. 1253-ND.]

AFFIDAVIT OF AUGUST WEYMANN

State of California,
County of Los Angeles—ss.

August Weymann, being first duly sworn, deposes and says:

That I am a resident of Los Angeles, California, and am retired; that I was and am a duly licensed attorney and a member of the Bar of the State of New York and of the State of California; that during the period from November 9, 1942, to February 28, 1955, I was either a Special Attorney in the Lands Division, Department of Justice, stationed at Los Angeles, California, or an Assistant United States Attorney of the Southern District of California, at Los Angeles; that during the period from December, 1952 to and including the date of my retirement, February 28, 1955, I was the attorney immediately in charge of the captioned proceeding and responsible for its conduct.

As an incident of the preparation of this affidavit, I [146] have examined the official files of the United States Attorney's office pertaining to the above-entitled case and, based upon the documents therein contained and upon my recollection of the events as they occurred, the following is a true and correct account of the institution and proceedings taken in connection with the conduct of this proceeding to the date of my retirement.

On or about December 9, 1952, there was received in the office of the United States Attorney at Los Angeles a preliminary draft of the Declaration of Taking assembly prepared for the acquisition of Tracts L-2040, L-2043, L-2071 and L-2072, collectively encompassing approximately 360 acres of land, in several ownerships, hereinafter identified as the Pancho Barnes property. This assembly was prepared in the office of the District Engineer at Los Angeles, and had been transmitted to the office of the Chief of Engineers for submission to the officers of the United States for handling and disposition.

Thereafter and on, to wit, February 9, 1953, there was received in the office of the United States Attorney at Los Angeles a letter from the Assistant Attorney General in charge of the Lands Division, Department of Justice, together with a certified copy of a letter, dated February 3, 1953, from the Honorable E. V. Huggins, Assistant Secretary of the Air Force, requesting the amendment of the condemnation proceeding then filed and yet pending in this Honorable Court, entitled *United States v. 1710.73 Acres of Land in the County of Kern, State of California, etc., et al.*, numbered Civil 1201-ND, and the filing of Declaration of Taking No. 2, together with the original and two copies thereof. The certified copy of the letter of the Assistant Secretary of the Air Force is identified in the affidavit of Richard A. Lavine, filed herein, as Item No. 2. The Assistant Attorney General's let-

ter referred to above is identified in the Lavine affidavit as Item No. 3. [147]

Thereafter and on February 20, 1953, I prepared and directed to the Lands Division of the Department of Justice a letter acknowledging receipt of the letters, 2 and 3 above, and of the Declaration of Taking, and also the receipt of a check in the sum of \$205,000, representing the estimated compensation. In my letter I called the attention of the Department of Justice to the fact that, in addition to the foregoing, I had already received an advance copy of a proposed Declaration of Taking assembly No. 3 for the acquisition of 14 additional tracts by way of amendment of Civil No. 1201-ND. For the reasons set forth in my letter of February 20, I requested specific authority and direction of the Attorney General to file a new and independent action for the acquisition of the so-called Pancho Barnes tracts, rather than to include said tracts by way of amendment in the existing action, 1201-ND, as well as a separate and independent action for the acquisition of the 14 additional tracts referred to in the preliminary draft of Declaration of Taking assembly No. 3. A copy of this letter is identified in the Lavine affidavit as Item No. 4.

On February 24, 1953, I addressed the District Engineer at Los Angeles, acknowledging receipt of the \$205,000 for deposit, the preliminary title certificates covering the tracts above mentioned, and of Declaration of Taking No. 2, and the preliminary assembly of Declaration of Taking No. 3. In

the same letter I acquainted the District Engineer with the reasons for and the request made to the Attorney General for authority to proceed by way of separate and independent suit for the acquisition of both the Pancho Barnes tracts, covered by Declaration of Taking No. 2, and the 14 additional tracts covered by the preliminary assembly of Declaration of Taking No. 3. This letter is identified in the Lavine affidavit as Item No. 6.

Thereafter and on, to wit, February 26, 1953, there was received at Los Angeles, from the Acting Assistant Attorney General [148] in charge of the Lands Division, a telegram, dated February 25, 1953, identified in the Lavine affidavit as Item No. 7, reading as follows:

“Reurlet February 20 Civil 1201ND. Satisfactory to institute new case covering land Declaration Taking 2.

“/s/ J. Edward Williams Actg Asst Atty General”,

whereupon, and pursuant to the foregoing authority and direction, the complaint in condemnation covering the Pancho Barnes property was prepared and filed in this court on February 27, 1953, and was numbered by the Clerk thereof 1253-ND.

On the same day, and pursuant to the same authority and direction, the caption and amending language in the Declaration of Taking transmitted with the Assistant Attorney General's letter of February 5, 1953, was conformed to the caption of the

instant suit and filed therein, and the sum of \$205,000 was deposited in the registry of this court as the estimated just compensation. An ex parte decree was entered upon said Declaration of Taking, and notice of filing of the action was issued and placed in the hands of the United States Marshal for service on March 4, 1953. On March 11, 1953, at the request and direction of Pancho Barnes, I prepared and filed in this court, in this case, a petition for partial distribution of compensation pursuant to Section 258a, Title 40, U.S.C. The petition was signed by E. S. McKendry, Pancho Barnes, named in the proceeding as Florence Lowe Barnes, a.k.a. Florence Lowe Barnes McKendry, and William Emmert Barnes, and was supported by an affidavit of E. S. McKendry and William Emmert Barnes attesting to the lack of interest in the property of Desert Aero, Inc., which, according to the then title certificates, had a conflicting interest in the property. The foregoing petition for partial distribution, executed as aforesaid, constituting a general appearance of the parties signatory thereto, [149] supplemental instructions were issued to the Marshal not to serve the process upon those defendants.

In the meantime and on March 3 and 4, 1953, respectively, the Department of Justice and the District Engineer were furnished with the preliminary transcripts of the case as then filed, including certified and plain copies of the complaint, certified and plain copies of the Decree on the Declaration of

Taking, and duplicate original Certificate of Clerk, evidencing the deposit of the estimated just compensation, all as required by the regulations of the Department of Justice.

On March 17, 1953, the Attorney General of the United States, having caused an examination to be made of the documents comprising the preliminary transcript, approved the same and rendered his preliminary title opinion to the Honorable Harold E. Talbott, Secretary of the Air Force. The opinion covers the tracts above mentioned, comprising the 360 acres more particularly described in the Decree on the Declaration of Taking. (Lavine affid.)

Pursuant to the request of the District Engineer, copies of the corrected first page of the Declaration of Taking were transmitted to him, and in turn by him, on March 24, 1953, the corrected first page was forwarded through channels to the Division Engineer at San Francisco. See Items 11 and 12 on the Lavine affidavit.

In determining upon the propriety of the request to the Attorney General for permission to proceed for the acquisition of the so-called Pancho Barnes tracts by separate and independent suit, rather than by way of amendment of 1201-ND, I was motivated by the conditions and circumstances set forth in my letter of February 20, 1953, and none other. At the time said letter was written I was not acquainted with General Joseph S. Holtoner, Colonel Marion J. Akers, or Lieutenant Colonel Marcus B. Sacks. At that time I had not had any communication of

[150] any kind, character or description with those officers or either of them. My first contact with either was as an incident of my preparation of the Government's application for an order of immediate possession in this case.

/s/ A. WEYMANN.

Subscribed and sworn to before me this 9th day of June, 1955.

[Seal] /s/ RICHARD A. LAVINE,
Notary Public in and for said County and State.

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause No. 1253-ND.]

AFFIDAVIT OF LT. COLONEL ROBERT P.
FOLEY

Robert P. Foley, Lieutenant Colonel, USAF, Base Commander, Edwards Air Force Base, Edwards, California, being duly sworn according to law deposes and states as follows:

That as Base Commander under appropriate Air Force Regulations and Directives, he is charged with the responsibility of supervising the housing of military and civilian personnel working at Edwards Air Force Base. That he is similarly charged with responsibility for supervising those Air Force facilities, such as the Base Exchange and the Com-

missary, which supply a few of the living needs of personnel at the base.

That there are 1,050 family housing units, commonly known as the Wherry Housing project, located on this Federal reservation, a few miles from the operational part of the base and outside the base security gates. That these units were constructed in two increments beginning in 1950 pursuant to Title VIII, National Housing Act (P.L. 211, 81st Congress).

That the need for such housing at the base was occasioned by the fact that the base was located at an extremely remote site in the Mojave Desert where no adequate private rental housing nor supporting community facilities were available.

That after a determination by the Secretary of the Air Force that a lease would effectuate the purposes of Title VIII National Housing Act, a lease for each increment of housing was entered into between the Secretary of the Air Force and the sponsor corporation, whereby certain described lands were leased to the corporation for 75 years for the purpose of constructing a housing project and leasing the housing units to military and civilian personnel. That under Title VIII, National Housing Act, the sponsor corporations received mortgage insurance from the Commissioner, Federal Housing Administration. That the Secretary of the Air Force, in each instance, entered into the leases under the authority of Act of August 5, 1947

personnel to the housing units in accordance with applicable Air Force Regulations and established base policies and procedures. [154]

That the activities of the base are expanding with an accompanying increase in the number of personnel living and working at the Base. That it is anticipated that this situation will continue and that housing and particularly the supporting community facilities will continue to be below existing need in the immediate future.

/s/ ROBERT P. FOLEY,
Lt. Colonel, USAF.

Sworn to and Subscribed before the undersigned this 10th day of June, 1955.

/s/ LAURANCE V. GOODRICH,
1st Lt., USAF. Judge Advocate, Hq Air Force
Flight Test Center. [155]

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause No. 1253-ND.]

AFFIDAVIT OF COLONEL MARION J.
AKERS, USAF

Marion J. Akers, Colonel, USAF, Chief of Staff, Air Force Flight Test Center, Edwards Air Force Base, California, being duly sworn according to law, deposes and states as follows:

The mission of the Air Force Flight Test Center at Edwards Air Force Base, California, is to accomplish functional (as distinct from engineering)

flight tests of complete manned aircraft weapon systems, including components and allied equipment; to conduct engineering evaluation flight tests of aircraft and power plants; to accomplish static firing tests of guided missile power plants; to accomplish research and development related to such tests; to plan for, control and operate the Experimental Rocket Engine Test Station, the USAF Experimental Flight Test Pilot School, Air Force Flight Test Center Track Testing Facilities, and other special test facilities; to provide facilities and special services for contractors and for other governmental agencies in support of the mission of the Air Research and Development Command.

In order to properly conduct this mission, it is absolutely essential that the Air Force Flight Test Center be located in an area which is relatively uninhabited, with weather conditions which permit a maximum amount of flight testing and an area wherein these tests can be conducted with a maximum amount of safety, security and economy. The purpose of testing new aircraft is to determine their capabilities and discover the fixes and alterations necessary to develop and provide the desired air vehicle. In the conduct of tests of new and experimental aircraft, difficulties are encountered which cannot be foreseen. If these tests are conducted in or over an area which is relatively uninhabited and free from industrial and commercial development, the safety of the aircraft and the crew is greatly enhanced. Safety for commercial, industrial and

private enterprise is also greatly enhanced by having an area wherein crashes, emergencies, or other mishaps may occur, without endangering the lives and property of individuals. There is also a great economy realized from the standpoint of loss of time and equipment and the prevention of possible claims against the government for damages. In the conduct of these tests, it is necessary to maintain the maximum amount of security since the work being conducted vitally affects the future potential of the United States military services.

In the build up of the Air Force Flight Test Center Congressional approval and funding have been secured for the acquisition of a large area suitable for meeting requirements satisfactory for the above. The approved area for the military reservation totals approximately 300,000 acres. The Pancho Barnes property, generally speaking, is located in the west central portion of the approved reservation area. In addition, this property is located approximately three and one-half miles off the end of an active test runway which has recently been completed as a part of the new permanent base. This property also lies within, approximately, five miles of the end of two other runways being used for test purposes. This property also lies on the center [157] line extension of the new test runway which will have a one mile clear zone area on either side of the center line extension between Rogers Dry Lake and Rosamond Dry Lake. The entire Pancho Barnes property lies within this two mile clear

zone. This clear zone is a safety factor and it is planned that within this area all obstructions to flight and safety for emergency landings will be removed. This will provide an area where expensive test aircraft may be landed with a minimum amount of damage and a maximum amount of safety for crew members in case of emergency.

Within this two mile clear zone and extension of the runway there is danger not only from emergency landings of aircraft, but from the possibility of falling objects such as bombs, tip tanks, and other items carried by test aircraft. There is also danger of fires, explosions and contamination from materials used in the test of certain equipment such as nitric acid, hydrogen peroxide, liquid oxygen, alcohol and other chemicals.

Within this clear zone area the operation of any type private flying field presents a grave danger of mid-air collision of aircraft and is therefore a serious hazard to flying safety.

Because of the difficulties encountered in the testing of new and experimental aircraft, mishaps or accidents do occur. Many of these occur shortly after takeoff or upon the approach to a landing or during the actual landing phase of flight. The location of this property within three and one-half miles of the end of an active test runway places it in a dangerous location.

An "All Altitude Speed Course" is used in connection with the testing of aircraft. The location of this speed course is such that the path of flight

of aircraft using this facility is over or near the Barnes property.

A Radar Telemetering facility is also used in connection with the testing of aircraft. Its location within approximately three miles of the Barnes property is dictated by its function, mission, and limitations imposed by the equipment used therein. Electronic disturbances cannot be tolerated in the operation of this facility and it is possible that such electronic disturbances could be generated from facilities or equipment used on the Barnes property.

/s/ MARION J. AKERS,
Colonel, USAF.

Sworn and subscribed to before me this 3rd day of June, 1955.

/s/ MARCUS B. SACKS,
Lt. Colonel, USAF. Staff Judge Advocate, Hq Air
Force Flight Test Center. [158]

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause No. 1253-ND.]

AFFIDAVIT OF BRIG. GENERAL J. S.
HOLTONER

J. S. Holtoner, Brigadier General, USAF, Commander of Air Force Flight Test Center, Edwards Air Force Base, California, being duly sworn according to law deposes and states as follows:

That he did not have any control or voice in the

institution of the condemnation action against the Pancho Barnes property. That he did not in any manner whatsoever give to any person advice concerning the institution of the condemnation proceedings against the Pancho Barnes property. That he did, in connection with the Government's motion for an order of immediate possession of Pancho Barnes property, authorize officers of the Air Force Flight Test Center to justify the necessity, consistent with the operational needs of Edwards Air Force Base, of having immediate possession of the said Pancho Barnes property. That he did not receive instructions from any source whatsoever to take any action whatsoever in order to get rid of Pancho Barnes.

That he denies emphatically that he ever informed the defendants or any of them that Edwards Air Force Base would use the defendants' property and improvements for private uses and purposes. That the entire Pancho Barnes property has not yet been turned over by Corps of Engineers, U. S. Army, to Edwards Air Force Base for use. That Edwards Air Force Base now intends and always has intended to clear all the improvements from the land of Pancho Barnes since her properties are within the clear zone established for the new runway. All obstructions in the clear zone must be removed as a safety factor in flying operations. That he was not influenced in any way whatsoever, as to the proposed use of the Pancho Barnes property, by the fact that Pancho Barnes has been ac-

tively contesting the right of the United States to condemn her property.

/s/ J. S. HOLTONER,
Brig. General, USAF.

Sworn to and subscribed before the undersigned
this 3rd day of June, 1955,

/s/ MARCUS B. SACKS,
Lt. Colonel, USAF. Staff Judge Advocate, Hq Air
Force Flight Test Center. [160]

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause No. 1253-ND.]

ANSWERING AFFIDAVIT TO ALL AFFIDA-
VITS FILED BY GOVERNMENT WIT-
NESSES IN THE LAST 11½ DAYS OF THE
HEARINGS OF JUNE 16 AND 17, 1955, AS
PER INSTRUCTIONS OF THE COURT

I, Pancho Barnes, a defendant in the above-
entitled case, being first duly sworn, depose and say:

That it appears the Government has gone to
lengths to complicate this case by overwhelming
the Honorable Court with a great diversity of in-
competent, immaterial, and irrelevant material in
Court and by way of affidavit.

The affiant feels that the Government did waste
two days of the Court's valuable time and did im-
pose upon the defendants and affiant by attempting
on May 23, 1955, to discredit the affiant and did on

June 6th waste time by not cooperating with the defendants and producing the papers needed to prove this case to the Honorable Court.

The affiant has dissected individually in writing the affidavits being here answered of the Government witnesses and found that a true and complete explanation does consume so many pages of writing that the simplicity of the case may be lost when [161] it is contemplated that sometimes it is difficult "to see the forest for the trees."

Therefore, the affiant does hereby as tersely and as concisely as is consistently possible attack said Government witnesses' affidavits.

Here refer to the affidavit of Richard A. Levine, re Files of U. S. Attorney's Office. Refer to item 2, which says, "Certified copy of letter of February 3, 1953, from E. V. Huggins, Assistant Secretary of the Air Force, to the Attorney General." Attention is now directed to the letter labeled exhibit 2 of the affidavit. This is not a certified copy of a letter. It is a photostatic copy of a certified copy of a copy of a letter. The letter is not signed but only stamped "E. V. Huggins." It does not have a heading, or tract numbers, or a date. The date is written in with ballpoint pen on the photostat itself, and initialed "RAL" in ink presumably by the maker of the affidavit, Richard A. Levine, in Los Angeles. As this appears to be the only authority purported to institute proceedings against the defendants, this document is insufficient under the rules of evidence. The best evidence would be the signed original, complete with date and heading,

showing the signature of E. V. Huggins. The affiant contends that as the Air Force did fly the large bulky brochures of the master plans of the air base from Washington to have in Court, and then admitted that there was no mention of the subject property in said plans; the Government could have more easily shown the original letter if such existed. The affiant does demand that if said letter is to be considered at all for any purpose that the original yet be produced. The defendants definitely question the date. The affiant, should such letter exist, then does contend that the Assistant Secretary of Air Huggins did not know the location of the subject property as the letter states "The land is required for construction purposes." It was conclusively proved to the Court that no construction [162] purposes were ever intended. However, if the Secretary believed that the land was required for construction purposes he could have believed that the subject property was located where it would have been included under Public Law 564 of the 81st Congress. The words of Congress are conclusive and the subject property was not included in Public Law 564 of the 81st Congress, which is the only specific acquiring statute employed.

For brevity refer to the list of documents as itemized by Richard A. Levine included and appended to his affidavit. Items (referred to as exhibits) Nos. 1, 3, 5, and 13 are photostatic copies of apparently signed, sent, and received originals. Items 2, 4, 6, 8, 9, 10, 11, and 12 are simply photostatic copies of unsigned carbon copies completely

unauthenticated, not showing that they were ever sent or received and are not admissible under the rules of evidence where the originals, if any, would be the best evidence. The last item of the affidavit, which purports to be a copy of a letter dated March 17, 1953, to Secretary of the Air Force Talbot from "Attorney General" is only a typewritten letter, unsigned, unauthenticated, not showing that it was sent or received and not admissible under the rules of evidence, as the best evidence would be the original, if any.

The unsigned, unauthenticated letters mostly refer to making a separate condemnation suit for the defendants. Referring to item exhibit 4, letter dated February 20, 1953, mentions of "Declaration of Taking No. 3," "involving commercial mud mine deposits." In the item exhibit 6, letter dated February 24, 1953, again mentions the Declaration of Taking No. 3, "involving commercial mud mine deposits." Now, the affiant feels that this "Declaration of Taking No. 3" referring to the "mud mines" is very significant because in the Congressional hearings of the 81st Congress the Air Force lobbyists do state definitely to Congress that a deal has been made with the mud mines and that it has been [163] agreed that they be relocated on a lake to the "southwest". The mud mines were very definitely included in Public Law 564 of the 81st Congress and were considered most important of all requirements. In Defendants' Exhibit B, the letter headed "Acquisition No. 20," which was submitted pursuant to Public Law 155 of the 82nd Congress, the

subject property is not mentioned, but it says, "It is proposed to relocate the mud mine operators at Rogers Lake to the Buckhorn Dry Lake area." This is the area of the subject property. The map included in the same Defendants' Exhibit B was not the same as seen by the defendants in the engineers' files but did correspond in priority numbers as in the map in Defendants' Exhibit A, showing the subject property in priority 4 and far away from the land as included under Public Law 564 of the 81st Congress. The mud mines were the main subject before the 81st Congress and were the only commercial business mentioned. The only material point in reference to the mud mines versus the subject property is that while Congress was told that a deal had been made with them a condemnation suit No. 1289-ND on the mud mines was filed some five months after the so-called Declaration of Taking was filed on the subject property. A condemnation suit has not been necessary to clear the title on any other properties where deals were made in the Muroc area. There seems to be no question that the Government has played fast and loose with the statutes, and is now attempting to "throw sand in the eyes" of the Court.

Regarding the affidavit of August Weymann, it is only a recitation and reiteration of the affidavit of Richard A. Levine's conglomeration of so-called exhibits. This affiant did phone Mr. Weymann and he said that he had had the Declaration of Taking No. 2 made over as was testified to by Mr. McPherson on the stand. No one, however, has ever given

his affiant any reason why there was such a rush, if any, that "wires" were necessary to institute a "new" suit. The affiant does point out that the [164] Declaration of Taking was not changed by order of the Assistant Secretary of Air Huggins, who signed the original document. There was in fact no authority from anyone to change the document. There was only a purported wire or teletype authorizing institution of a "new" case, and not by the Assistant Secretary of Air Huggins. A Declaration of Taking in Eminent Domain corresponds to a "deed." It is well settled by law that any alteration of a deed nullifies and voids same. While Mr. Weymann was under the direction of the Department of Justice and may have had authority to institute a new suit he had no authority to change or alter a document signed by the Assistant Secretary of Air Huggins. Nor did Mr. Huggins give such authority to either the Department of Justice or to Mr. Weymann.

The affiant does claim that the Declaration of Taking No. 2 in case No. 1201-ND was never intended as a document to take the subject property but was used as a "gimmick" in a "pinch." This contention is borne out by the absolute fact that William M. Curran did testify on the stand that he had caused the document to be made on November 24, 1952. He also testified to and put into evidence a wire dated December 1, 1952, to the effect that if an option for the subject property could not be obtained then a condemnation assembly should be prepared. There is a definite admission here that

the document entitled "Declaration of Taking No. 2" in case No. 1201-ND was not prepared by authority of the wire of December 1 as said document was prepared previous to the wire of December 1, 1952. The declaration of taking does not read to show that it was intended to add lands to case No. 1201-ND, which would seem to be the legally consistent showing if such were true. Case No. 1201-ND consists of 1,710.73 acres of land and 42 separate owners. It was filed many months previous to the case on the subject property. The affiant does not understand amending a complaint involving 42 separate owners by adding new owners. However, there is evidence [165] that the Assistant Secretary Huggins thought the subject property was needed for construction, and as there is definite evidence that there was no statute that would include the subject property subsequently made by Congress, then the affiant believes that the Declaration of Taking No. 2 was made over and used as it might be less questioned by Assistant Secretary Huggins. However, Mr. McPherson did explain from the stand that the Secretary didn't know what he was signing anyway. Also, the Schedule A, being a description of the subject properties, does not show that it was seen or acknowledged by the Assistant Secretary and it is not signed or initialed by the Assistant Secretary or anyone else.

Refer to the affidavit of J. S. Holtoner. General Holtoner admits that he gave instructions to officers under his command to "justify the necessity" for the subject property. Whereupon "heroic" at-

tempts which are full of "holes" were made to this effect. However, the determination of necessity could only be made by the Secretary or the Assistant Secretary of the Air Force and then only under and pursuant to the specific statute Public Law 564 of the 81st Congress, passed June 17, 1950, which showed no necessity for the subject property nor did it include the subject property.

"Eminent domain statutes are strictly construed and must be strictly complied with to pass title to sovereign." U. S. v. 8,557.16 Acres of Land in Pendleton County, W. Va., D. C. W. Va. 1935, 11 F. Supp. 311.

"Express legislative power to procure is necessary to authorize the condemnation of private property for public use." U. S. vs. Raders, D. C. Ga. 1895. 70 F. 748.

"The power of eminent domain is inherent in the Federal Government as an aspect of sovereignty, subject to requirements of U.S.C.A. Const. Amend. 5, that just compensation be paid, but power to condemn may be exercised only when explicitly by statute." U. S. vs. Fisk Bldg., D. C. N. Y. 1951, 99 F. Supp. 592. [166]

General Holtoner had no power to "justify necessity" for any purpose.

Furthermore, Holtoner's affidavit is quite contrary to the testimony from the stand in the case Barnes v. Holtoner, when he contended that he was acting under color of his authority. This affiant does here state that Holtoner did inform the defendant that he would use the subject property in-

tact and in any way he wished. As to whether the hastily made over Declaration of Taking No. 2, case No. 1201-ND, as "corrected," naming the subject property, and the Complaint in Condemnation made, signed, and filed on the 27th of February, 1953, was done through the instigation of Holtoner the defendants and affiant had General Holtoner's word for it. The day before the changing of the Declaration of Taking and the filing of same, Holtoner informed the defendants that there would be "immediate action". And there was! He said that he would get rid of the defendants and that he could be rough about it, too—he could drop napalm bombs on the defendants. Later, when his rage somewhat subsided, he remarked in the presence of this affiant and others, "It's too bad we can't do things like that in this country!" The scene with Holtoner, in which the defendants were informed by Holtoner that he would get rid of them immediately, is the only logical explanation that would cause the entire changing of a serious and important document such as a Declaration of Taking. Changing the document showed haste and disregard of legal formality. As there is no other evidence that haste was required, it is still conclusive to this affiant as to what happened and why the Government should grab an existing Declaration of Taking and make it over.

Refer to the affidavit of Lieutenant Colonel Robert F. Foley. The affiant does welcome this affidavit as accumulative evidence as to what the defendants refer to as the "monopoly town" of Edwards. It

confirms the allegations of the defendants that many [167] thousands of people live closer to the base activities than the subject property. This town of Edwards is in a more vulnerably situated location than the subject property. This town is leased to private enterprise. The Government forcibly took away the rights of and discriminated against the small business people in the area and gave away to a monopoly the inherent rights of the local people with great injury to many, including the defendants in this case.

The affidavit of Lieutenant Colonel Foley is, however, untrue regarding the distance necessary to travel to places where purchases could be had equivalent to those offered at Edwards. The town of Rosamond, more adequate than Edwards, is only 15 miles from Edwards. There is also Ma Green's restaurant, liquor store, etc., and garage and service station right across the tracks across the road (Highway 466) from the base; approximately 5 or 6 miles from the congested population and much closer to the north base than Edwards. North Muroc is close and there is much to be found all along Highway 466, including the town of Boran, etc.

Referring to the affidavit of Colonel Akers. This affidavit is contrary to the affidavit of Lieutenant Colonel Foley. Akers says, "It is absolutely essential that the—area—is relatively uninhabited." It is inconsistent that they built the monopoly town of Edwards and the Wherry housing with several thousand people in that vicinity. Colonel Akers states that a "maximum amount of security" is re-

quired. However, the whole place is wide open and inviting trade from the public and closer than the subject property. Any hazard that the subject property might be exposed to is equally hazardous to the town of Edwards, and for that matter the whole surrounding desert with many communities. The airport on the subject property operated for 9 years with no conflict and there is no abnormal hazard or conflict there. Any interference or electronic disturbance is absurd. As to the "clear zone" where "expensive test aircraft may be landed with a minimum amount of [168] damage" extending from Rodgers Dry Lake to Rosamond Dry Lake, the land around the Buckhorn area is extremely rugged and to level it would be beyond reason. The affiant does assure the Honorable Court that the subject property is plenty far away from the air base runways with regards to every conceivable reason. The new runway will, because it is so very long, keep aircraft even further away from the subject property. Colonel Akers has violated the sanctity of his oath repeatedly on both material and immaterial questions before the Court and by way of affidavit. This present affidavit is not so much perjurous in fact as it is in intent to mislead the Court, as its substance, in part true, is not any more applicable to the subject property than to the community of Edwards.

The map, Government exhibit number 4, was introduced without any testimony on either side. The affiant did request the Government to allow her to use this map for testimony when she was on the stand. The Government refused. Said map is made

with the intention of trying to implicate the subject property in a claim for "necessity." To an uninformed person who is not familiar with the terrain and with the operation of aircraft, the map might be "impressive." To an informed person familiar with the precise situation, terrain, etc., the map is ridiculous! Should this map be of any material interest to the Court, the affiant does demand a verbal explanation before the Court. The map has the following blatant fallacy: (1) The "paddle-like extensions" of the runways are theoretical, not practical, and mean nothing. Note the northern runway "paddle-like extension" crosses Highway 466 and goes off the base and is over an inhabited area. The western "paddle-like extension" of all the shown three runways all cross county-owned and maintained and heavily trafficked highways closer to the subject property by a question of several miles. The Government maps put into evidence before Judge Beaumont showed eight runways and sixteen "paddle-like extensions" that crossed the Wherry housing, etc., etc. [169] (2) This map does not show the Wherry housing, monopoly town of Edwards, etc. (3) This map shows the so-called "clear zone" going over Buckhorn Lake where the mud mines were to be located according to the testimony given Congress and according to the "acquisition project No. 20," Defendants' Exhibit B, pursuant to Public Law 155 of the 82nd Congress. (4) The map does not indicate the rugged and extremely rough terrain where a "clear zone" would not economically be within reason.

The affiant does believe that the only truly material subjects are the improper institution of the condemnation complaint made in bad faith, the alteration of the Declaration of Taking, the estimate of just compensation which was obviously made in bad faith, the ex parte judgment which is unconstitutional.

Please refer to and read carefully the points and authorities cited in both the motion to dismiss and the motion to set aside the Declaration of Taking and vacate the ex parte judgment.

The affiant does feel that "right or wrong, it's my country" and should the Government really have a true necessity for the subject property in the interests of our country, then whether the statutes be right or wrong the Government should have said property without question. However, it is the duty of all the patriotic citizens of this country to fight Government oppression as a sovereign people and to insist that the Government proceed in a legal manner under the statutes. This fight is more paramount than any war on the face of the earth—that of keeping America a free country. It is also the duty of the Honorable Court to uphold the statutes and the laws as made by Congress and to uphold the Constitution of the United States of America. Without the honor of our judges we would lose our birthright as a free people!

Please read the deposition of Marvin Edwin Whiteman taken October 13, 1953, and accepted into evidence February 25, 1954, by Judge Beaumont. This deposition, together with the affidavit

[170] of the defendants already on file, as a prima facie showing as to the value of the subject property, should be sufficient evidence to easily justify the Honorable Court in setting aside the Declaration of Taking and vacating the ex parte judgment.

Of course, as the Declaration of Taking is null and void because of alterations, the prima facie value of the property may not need to be considered.

/s/ PANCHO BARNES.

Subscribed and sworn to before me this 5th day of July, 1955.

[Seal] /s/ RICHARD C. MARSH,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires August 18, 1958. [171]

Acknowledgment of receipt of copy attached. [172]

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause No. 1253-ND.]

ORDERS ON MOTION TO DISMISS THE
COMPLAINT AND MOTION TO SET
ASIDE THE DECLARATION OF TAK-
ING AND TO VACATE AND SET ASIDE
THE EX PARTE JUDGMENT ENTERED
THEREON

On April 22, 1955, defendants E. S. McKendry, Florence Lowe Barnes McKendry, and William Emmert Barnes filed a motion to dismiss the complaint and on the same day filed a motion to set

aside the Declaration of Taking dated February 27, 1953, and to vacate and set aside the ex parte judgment entered thereon on March 22, 1953.

The defendants filed a supplement to the motion to dismiss on June 1, 1955, and it included a "more definite statement" in response to plaintiff's motion for a more definite statement filed May 10, 1955.

The motion to dismiss listed seven grounds. The supplement to the motion repeated these seven grounds with amplification and elaboration. Five additional grounds are set forth in the supplement.

The motion to set aside the declaration of taking and to vacate and set aside the ex parte judgment entered thereon is based on four grounds. A supplement to the motion to set aside the declaration of taking was filed on June 1, 1955. The supplement adds two grounds. [173]

The motions came on for hearing before the Court on May 2nd, May 23rd and June 16th and 17th, 1955. The defendants appeared in propria persona and the plaintiff was represented by the United States Attorney, Joseph F. McPherson appearing. Oral and documentary evidence was received on behalf of the parties.

The record discloses that similar motions were filed in this action by the defendants on September 5, 1953. Long and protracted hearings were held before the Honorable C. E. Beaumont, Judge of this Court, now deceased, and orders were entered by Judge Beaumont on March 23, 1954, denying both motions. A comparison of the motions heard by

Judge Beaumont with the pending motions and a review of the transcripts of the hearings before Judge Beaumont disclose that substantially the same matters were before Judge Beaumont as were presented at the hearings on the pending motions, with the exception of the fifth ground of the supplement to the motion to set aside the Declaration of Taking filed on June 1, 1955, which ground in substance alleges that the Declaration of Taking is a fraudulent, manufactured or forged document.

Some of the matters of which the defendants complain were the subject matter of a law suit in this Court entitled "Pancho Barnes vs. Joseph Stanley Holtner and Marcus B. Sacks", bearing No. 15403-C. The case was heard by the Honorable James M. Carter, Judge of this Court. Findings of fact, conclusions of law and judgment were filed adverse to the plaintiffs in that action.

The pending motions boil down to essentially six grounds. Many facets of these grounds appear in the record, all of which have been considered by the Court in reaching the conclusions hereinafter set forth. These six grounds [174] and their facets may be summarized as follows:

1. The property was not taken under Public Law 564, 81st Congress, 64 Stat. 236, or any other law.
2. Fraudulent representations were made to Congress.
3. Absence of necessity for the taking of the property.

4. The deposit made by the plaintiff to the Registry of the Court at the time of the taking was grossly inadequate.

5. Unlawful and illegal discrimination was practiced against the defendants and other land owners.

6. That the Declaration of Taking was fraudulent, manufactured or forged.

The six grounds will be considered *ad seriatim*.

1. The complaint and the Declaration of Taking filed herein on February 27, 1953, state that the "authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. Sec. 257); and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C. Sec. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C. 1343 a, b, and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 28, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress); and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes." [175]

Edwards Air Force Base (formerly Muroc Air Force Base) is presently a special installation under the Air Materiel Command and, among other things, is the flight test station for all new aircraft being produced for the United States Air Force.

The mission of the Air Force Flight Test Center at Edwards Air Force base is, among other things, to accomplish functional flight tests of complete manned aircraft weapon systems, including components and allied equipment; to conduct engineering evaluation flight tests of aircraft and power plants; to accomplish static firing tests of guided missile power plants; to accomplish research and development related to such tests; to plan for, control and operate the experimental rocket engine test station, the USAF experimental flight test pilot school, Air Force flight test center track testing facilities, and other special test facilities, and to provide facilities and necessary services for contractors and other governmental agencies in support of the prescribed mission of the Air Research and Development Command.

Edwards Air Force Base was established many years ago. Several enlargements of the area of the Base and changes in the mission and functions thereof have been authorized and undertaken. At present the base encompasses an area of approximately 300,000 acres being developed in accordance with a master plan approved in 1950.

The enlargement of Edwards Air Force Base involved, among others, this condemnation action, resulting from the determination of necessity made

by the Secretary of the Air Force under and pursuant to the several statutes referred to in the complaint. [176]

Specific authorization to acquire the lands necessary to effectuate the determination of the Secretary of the Air Force and the appropriation of funds required for that purpose is found in the Act of June 17, 1950, Public Law 564 of the 81st Congress (64 Stat. 244); the Act of September 6, 1950, Public Law 759 of the 81st Congress, (64 Stat. 595, 748); the Act of January 6, 1951, Public Law 911 of the 81st Congress (64 Stat. 1223-1233); the Act of January 6, 1951, Public Law 910 of the 81st Congress (64 Stat. 1221, 1223).

Public Law 564 of the 81st Congress provides in part:

“The Secretary of the Army * * * is hereby authorized to establish or develop military installations and facilities by the construction, installation or equipment of temporary or permanent public works including buildings, facilities, appurtenances, and utilities as follows: * * *

“Muroc Air Force Base, California; * * * land for base expansion * * *.”

Title 4 of Public Law 564 authorizes the appropriation for the construction and expansion of the air base described above in the amount of \$159,006,-593.00. Title V of Public Law 759 of the 81st Congress and Public Laws 910 and 911 of the 81st Congress authorize supplemental appropriations for the acquisition of land and the construction work on the Air Base.

2. Defendants allege that incorrect and misleading information was given to the Congressional Committee of the 81st Congress regarding land for base expansion at Muroc at the time the Committee was considering Public Law 564. It is alleged that Congressman Johnson was misled and influenced by the local Commanding Officer and that the Committee was [177] misled by "Air Force Lobbyists". Particular complaint is made of a statement made by Congressman Johnson to the Committee. Congressman Johnson visited the air base and surrounding area and furnished a written report to the Committee. When questioned by the Committee as to the town site, he stated, "This is not a town; it is only a station; they are building in that area;" and of the statement of Colonel Myers that "it [the town site] is a stop on the railroad; there is a post office there and a few other buildings". (Government's Exhibit No. 5 and Defendants' Exhibit "K".) Defendants contend that this information was false and misleading because of the existence in the townsite of homes, motels and other business establishments. This Court is of the view that it is limited to the question of the power of Congress and not to the reasons which prompted Congress to enact the law. (*Angle v. Chicago, St. Paul, Minneapolis and Omaha Railway Co.* 151 U.S. 1, 38 L. Ed. 5.)

3. The defendants contend there was no necessity for the taking of the property in question. There can be no question from the record that the defendants firmly believe that no necessity exists for the

taking of their property. The affidavit of Colonel Marion J. Akers, USAF, Chief of Staff, Air Force Flight Test Center, Edwards Air Force Base, California, and the affidavit of J. S. Holtoner, Brigadier General, USAF, Commander of Air Force Flight Test Center, Edwards Air Force Base, California, clearly establish the necessity for the taking. Congress delegated to the Secretary of the Air Force the power to determine the necessity for the taking in the instant case. He made such determination. This Court has no power to re-determine the question. (U.S. v. Welch, 327 U.S. 546; 90 L. Ed. 945; [178] City of Oakland v. U.S., 124 Fed. 2d 595, cert. den. 316 U.S. 679; U.S. v. 277.97 Acres of Land, 112 Fed. Supp. 159.)

4. There was deposited in the Registry of the Court at the time of the Declaration of Taking, the sum of \$205,000.00. Defendants contend that this estimate was a mere nominal sum and that the amount of such deposit shows bad faith and arbitrary and capricious action. At the time the Declaration of Taking assembly was submitted to and approved by the Secretary of the Air Force he had before him an appraisal of the subject property prepared by an experienced qualified contract appraiser who had determined the fair market value to be \$205,000.00. The Secretary had no other or contrary appraisals and his estimate of the just compensation required by statute which he caused to be deposited in the Registry of the Court is the sum of \$205,000.00, the full amount of the contract appraisal. We have here simply a disagreement as to the fair

market value of the property. No convincing evidence was introduced that the deposit was inadequate. Nothing appears in the record to suggest that the Secretary of the Air Force acted in bad faith or in an arbitrary and capricious manner. However, even if the deposit were inadequate, more inadequacy will not support the pending motions. (U.S. v. 48,752.77 Acres of Land, 55 Fed. Supp. 563.)

5. Defendants contend that much land was condemned or purchased by the Government under threat of condemnation, and existing establishments were put out of business. In lieu thereof it is alleged a "Monopoly Town" was created under the Wherry Housing Act. Title VIII was added to the National Housing Act by Public Law 211, 81st Congress, 12 U.S.C.A. section 1748, and is commonly referred to as the Wherry Housing Act. As shown by the affidavit of Lt. Col. [179] Robert T. Foley, USAF Base Commander, Edwards Air Force Base, Edwards, California, a need for such housing at the Base was occasioned by the fact that the Base was located at an extremely remote site in the Mojave Desert, where no adequate private rental housing or supporting community facilities were available. This created a morale problem, discouraged enlistments and caused unrest and dissatisfaction among the Base personnel.

The Secretary of the Air Force determined that lease would effectuate the purposes of the Wherry Housing Act and leases were entered into with the sponsor corporations, the Edwards Base Housing Corporation and the Muroc Housing Corporation,

for the erection of housing units and community facilities. Space in the community facilities is leased by the sponsor corporations to the individual leasing tenants who operate the type of establishments usually found in a shopping center. The result has been what the defendants call a "Monopoly Town" in lieu of the businesses formerly conducted by individual land owners whose property was either condemned or purchased by the Government.

The wisdom of legislation such as the Wherry Housing Act rests with Congress and not with the Courts. The Secretary of the Air Force made his determination and entered into leases under the authority granted by Congress. The Court cannot substitute its judgment for the judgment of the Secretary.

6. With respect to the claim that the Declaration of Taking was a fraudulent, manufactured or forged document, the Court is satisfied from the evidence that the document was not fraudulent, manufactured or forged. The complete files on this matter were received in evidence. In December of 1952 there was pending and undetermined in this Court an action [180] entitled "U.S. v. 1710.3 Acres of Land in the County of Kern, etc. No. 1201-ND". By letter dated February 3, 1953, from E. V. Huggins, Assistant Secretary of the Air Force, to the Attorney General it was requested that the above mentioned action be amended by including therein the property of these defendants. It was determined by the Attorney General that it would be better to acquire the defendants' property by a separate and

independent action rather than by way of amendment to the above mentioned action. This was done with the approval and ratification of the Assistant Secretary of the Air Force. The Secretary of the Air Force determined that the land in question would be condemned. The Attorney General determined the manner of its acquisition. (U.S. vs. California, 332 U.S. 19; U.S. vs. San Jacinto Tin Co., 125 U.S. 273; Clark vs. U.S., 155 Fed. 2d 157.)

Defendants also complain that priorities of taking were changed without authority. Priorities may be changed by the same authority that established them.

The subject matter of the sixth ground is covered by the affidavits of Richard A. Lavine, Assistant United States Attorney, assigned to the Lands Division of the United States Attorney's Office for the Southern District of California; the affidavit of August Weymann, a Special Attorney in the Lands Division, Department of Justice, who was in charge of the proceedings from December, 1952 to and including February 28, 1955; the testimony of William M. Curran, Jr., Attorney for the Corps of Engineers, United States Army, stationed in Los Angeles, California, and the affidavit of defendant Pancho Barnes, aka Florence Lowe Barnes McKendry. The Declaration of Taking in question was and is a valid document and is neither forged, manufactured nor fraudulent. [181]

The motions of the defendants to dismiss the complaint to set aside the Declaration of Taking and to vacate and set aside the ex parte judgment

entered thereon are and each of them is denied. The defendants are granted thirty days from date in which to file their answers to the complaint, if they desire to do so.

The Clerk of this Court is directed to mail copies of this order to the defendants and to counsel for the plaintiff.

Dated: October 14, 1955.

/s/ GILBERT H. JERTBERG,
Judge, U. S. District Court. [182]

[Endorsed]: Filed Oct. 17, 1955.

[Title of District Court and Cause No. 1253-ND.]

MOTION TO STRIKE PORTIONS OF ANSWER OF PANCHO BARNES; MOTION TO STRIKE PORTIONS OF ANSWER OF PANCHO BARNES, E. S. McKENDRY, AND WILLIAM EMMERT BARNES; NOTICE OF MOTIONS

Motion to Strike Portions of Answer of Defendant Pancho Barnes.

Comes now the plaintiff, United States of America, by Laughlin E. Waters, United States Attorney, and Joseph F. McPherson and Richard A. Lavine, Assistant United States Attorneys, and moves the court for an order to strike the following portions of the answer of defendant Pancho Barnes:

Commencing on line 23, page 1, with the words: "That the government appraiser * * *" to and in-

cluding the words "For defendants costs of suit" on page 2, line 13.

The grounds of said motion are as follows:

1. The material which plaintiff has moved to be stricken does not present any legal defense or defenses to the condemnation action, and is irrelevant to this action.

2. Said material has been included substantially by way of [183] allegation or evidence produced in support of previous motions to dismiss and to set aside the declaration of taking. The Orders on Motion to Dismiss the Complaint and Motion to Set Aside the Declaration of Taking and to Vacate and Set Aside the ex Parte Judgment Entered Thereon, filed October 17, 1955, are the law of the case and are determinative of said issues.

3. The declaration of taking shows on its face that the taking is for a military and public purpose.

4. This court has judicial knowledge that the use of the property taken is for the expansion of Edwards Air Force Base, and that such is a public and military purpose.

5. This court has no power to review the necessity of the taking, the quality of the estate taken, the extent of the taking, or the particular tracts to be taken, which are matters that have been delegated by Congress to the discretion of the Secretary of the Air Force.

6. The defendant and defendants seek to impose conditions upon the taking of such property by the United States, and this court has no jurisdiction or authority to impose conditions upon the taking of

property for the purpose of condemnation as provided by statute.

This motion will be based upon the files and documents on file in this action, and the moving papers.

Motion to Strike Portions of Answer of Defendants
Pancho Barnes, E. S. McKendry and William Emmert Barnes.

Comes now the plaintiff, United States of America, by Laughlin E. Waters, United States Attorney, and Joseph F. McPherson and Richard A. Lavine, Assistant United States Attorneys, and moves the court for an order to strike the following portions of the answer of defendants Pancho Barnes, E. S. McKendry and William Emmert Barnes: [184]

1. All of Paragraph 1 on page 1 thereof.
2. All of Paragraph II on page 1 thereof.
3. All of Paragraph III on page 1 thereof.
4. Commencing with the First Defense on page 2, line 7, to and including the words "3. That if said lands be condemned", on page 5, line 15.
5. Commencing with the words "* * * including severance damages * * *" on page 5, line 17, to and including the words "For defendants' cost of suit", on page 5, line 23.

The ground of said motion are as follows:

1. Plaintiff refers to the six grounds set forth in the Motion to Strike Portions of Answer of Defendant Pancho Barnes, *supra*, and incorporates same by reference.

2. The Seventh and Eighth Defenses are frivolous and without merit or substance in that the Sections 257 and 258a have repeatedly been ruled to be unconstitutional.

This motion will be based upon the files and documents on file in this action, and the moving papers.

Notice of Motions

To defendants Pancho Barnes, E. S. McKendry, and William Emmert Barnes:

You and Each of You will please take notice that at 10:00 a.m. on Monday, December 5, 1955, before the Honorable Gilbert H. Jertberg, Judge of the above entitled court, in the United States Post Office and Court House at Fresno, California, located at 2309 Tulare Street, plaintiff will move to strike the said portions of the answer of defendant Pancho Barnes, and the answer of defendants Pancho Barnes, E. S. McKendry, and William Emmert Barnes.

Dated: This 17th day of November, 1955.

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

/s/ By RICHARD A. LAVINE

Attorneys for Plaintiff. [185]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 18, 1955.

[Title of District Court and Cause No. 1253-ND.]

AMENDED ANSWER

In answer to plaintiff's complaint, defendants Pancho Barnes, E. S. McKendry and William Emmerm Barnes, admits, denies and alleges:

I.

The defendants deny generally and specifically all the allegations contained in Paragraph II.

II.

The defendants deny generally and specifically all the allegations contained in Paragraph III.

III.

The defendants admit that the estate taken is the fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines, Except as specifically admitted, defendants deny each and every one of the remaining allegations of Paragraph IV.

IV.

[194]

Defendants admit the allegations of Paragraph V.

V.

Answering the allegations of Paragraph VI, defendants admit that the names of the owners of the said land are as follows:

Tract L-2040: E. S. McKendry; Florence Lowe Barnes McKendry.

Tract L-2043: William Emmert Barnes; Florence Lowe Barnes McKendry.

Tract L-2071: E. S. McKendry; aka E. S. McKendry and Florence Lowe Barnes McKendry.

Tract L-2072: E. S. McKendry; Florence Lowe Barnes McKendry.

Except as expressly admitted defendants deny generally and specifically each and every one of the remaining allegations of said paragraph.

Pancho Barnes is the leasee of the subject property. Said lease was in effect since 1942, an additional lease was written in 1951 because of an additional owner E. S. McKendry and is now current and will be until 1976.

First Defense

That the Secretary of the Air Force and or the Assistant Secretary of the Air Force did act in bad faith, was arbitrary, capricious, without adequate determining principle, or was unreasoned in requesting that the Attorney General of the United States begin condemnation proceedings on the subject land for the following reasons; That Public Law 564 is the only public law which pertains to the taking of specific property in this complaint, and according to the Congressional Committee meetings which it was necessary to study to determine the ambiguous phraseology of Public Law 564 which referred only to "land for base expansion". Congress was exact and definite as to the land, and as to the character of the land and its location included in Public Law 564. The subject land was not [195]

included within this public law. The suit was improperly initiated and was made in bad faith.

Second Defense

That the so-called Declaration of Taking was a fraudulent, manufactured or forged document. The Declaration of Taking No. 2 subsequently made over from Case No. 1201 ND to Case 1253 ND was manufactured prior to any authorizing power to make same and was not made for the subject property. The above referred to Declaration of Taking No. 2 was made over after it was signed by Assistant Secretary E. V. Huggins with no authority from the signer and is a forged document. The land was taken without due process of law as guaranteed by the V Amendment of the Constitution.

Third Defense

It is alleged by the Department of Justice that the Assistant Secretary of the Air Force Huggins stated that the property was necessary for "Construction purposes", whereas said property was not needed for construction purposes, was not needed for public use and was taken in bad faith.

Fourth Defense

The estimate of "just" compensation was made in bad faith and was so inadequate that it is a mere token compliance with the statute. The Appraiser Mr. Bernard Evans refused to consider many of the assets of the property or the best use thereof. Thereby depriving the defendants of their rights under the V Amendment.

Fifth Defense

The owners and leasee of the property were subjected to abuse and discrimination by the Air Force. The local Commander, General J. S. Holtoner did threaten to bomb them and acted or thought he acted in the interest of the Air Force. An arson fire destroyed five buildings on the ranch. Business fell off sharply under his efforts and defendant Pancho Barnes was shot at on several occasions. Lt. Col. Sacks, the local base legal officer, also threatened to [196] bomb the defendants. The Federal Bureau of Investigation, under direction of the Air Force called on clients of the ranch, contacting them all over the country and Alaska inquiring as to the morals of the place (which were above reproach) to the detriment of the business. The owners and leasee were discriminated against as they were shoved off their place while others closer to the base were allowed to continue operations. The business of the local people including defendants and leases were made to cease and their property seized while other private individuals were given their business under lease on Air Base property. Thereby depriving defendants of their rights under the V Amendment.

Sixth Defense

That officers of the Air Force have used false and manufactured documents and have perjured themselves during hearings heretobefore held in this case, thereby depriving the defendants of their rights under the V Amendment of the Constitution.

Seventh Defense

Defendants allege that the oil, petroleum, hydrocarbons and minerals including gold lying under the land described in the complaint, are not to be used for extending said Air Force Base or for any other military or public purpose or use.

Wherefore, defendants pray judgment as follows:

1. That their interest in said land be not condemned and that the plaintiff take nothing by its complaint, and that the property be restored to its rightful owners and leasee intact, and in the same condition as of the day of taking, February 27, 1953, together with payment of all damages as suffered by the defendants.

2. That if said lands are condemned, that the oil, petroleum, hydrocarbons and minerals lying thereunder be excepted.

3. That if said lands be condemned, just compensation for the taking thereof be awarded including all damages to oil and mineral rights including severance damages if the mineral rights [197] are retained by defendants.

4. For defendant's costs of suit and such other and further relief as to the Court may seem just and proper.

Dated: December 4, 1955.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona.

[Endorsed]: Filed Dec. 5, 1955.

[Title of District Court and Cause No. 1253-ND.]

ORDER GRANTING PLAINTIFF'S MOTION
STRIKING PORTIONS OF DEFEND-
ANTS' ORIGINAL ANSWERS; GRANT-
ING DEFENDANTS' LEAVE TO FILE
PROFFERED AMENDED ANSWER WITH
PORTIONS THEREOF STRICKEN

This cause came on to be heard before the Honorable Gilbert H. Jertberg, United States District Judge, at Fresno, California, on December 5, 1955 on plaintiff's motion to strike portions of defendants' answers filed herein on November 14, 1955, and the defendants Pancho Barnes, E. S. McKendry, and William Emmert Barnes then and there proffered a proposed amended joint answer realleging and reasserting defenses heretofore ruled adversely to said defendants, and the court having heard argument thereon and being fully advised in the premises,

It Is Adjudged, Ordered and Decreed:

I.

Plaintiff's motion to strike certain portions of the answer of defendant Pancho Barnes, filed November 14, 1955, is granted, and the following portions are stricken from said answer:

Commencing on line 23, page 1, with the words, "That the [201] government appraiser * * *", to and including the words, "For defendants' costs of suit", on page 2, line 13.

II.

Plaintiff's motion to strike certain portions of the answer of defendants Pancho Barnes, E. S. McKendry, and William Emmert Barnes, filed November 14, 1955, is granted, and the following portions are stricken from said answer:

- a. All of Paragraph 1 on page 1 thereof.
- b. All of Paragraph II on page 1 thereof.
- c. All of Paragraph III on page 1 thereof.
- d. Commencing with the First Defense on page 2, line 7, to and including the words, "3. That if said lands be condemned," on page 5, line 15.
- e. Commencing with the words, "* * * including severance damages * * *", on page 5, line 17, to and including the words, "For defendants' costs of suit," on page 5, line 23.

III.

The proposed answer of defendants Pancho Barnes, E. S. McKendry and William Emmert Barnes may be filed, except that the court of its own motion strikes the following portions of said proposed answer:

- a. All of Paragraph I on page 1 thereof.
- b. All of Paragraph II on page 1 thereof.
- c. Commencing with the First Defense on page 2, line 20, to and including the words, "* * * or public purpose or use," on page 4, line 21 thereof.

d. All of prayer numbered 2, on page 4, lines 28 and 29 thereof.

e. That portion of prayer numbered 4, on page 5, line 2 thereof, reading as follows: "For defendant's costs of suit." [202]

Dated: This 21st day of December, 1955.

/s/ GILBERT H. JERTBERG,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney,

JOSEPH F. McPHERSON,
RICHARD A. LAVINE,
Assistant United States Attorneys,

By RICHARD A. LAVINE,

Attorneys for Plaintiff. [203]

Affidavit of Service by Mail Attached. [204]

[Endorsed]: Filed Dec. 21, 1955.

United States District Court, Southern District of California, Northern Division

No. 1253-ND Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

360 ACRES OF LAND, MORE OR LESS, IN
THE COUNTY OF KERN, STATE OF
CALIFORNIA; E. S. McKENDRY, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND FINAL JUDGMENT IN CON-
DEMNATION (AS TO TRACTS Nos. L-2040,
L-2043, L-2071, AND L-2072)

The above-entitled eminent domain proceeding came on regularly for trial in this court on June 5, 1956, before the Honorable Gilbert H. Jertberg, United States District Judge, and a jury of twelve duly qualified persons, empaneled and sworn to try the issue of just compensation for the taking and condemnation by the plaintiff of the lands and estates therein more particularly described in the Complaint in Condemnation and in the Declaration of Taking filed herein, which for convenience were designated as Tracts Nos. L-2040, L-2043, L-2071, and L-2072, comprising in the aggregate 368 acres, more or less, lying and being in the County of Kern, State of California.

Plaintiff appeared by its attorneys of record, Laughlin E. Waters, United States Attorney, and Joseph F. McPherson and Albert N. Minton, Assistant U. S. Attorneys, and the defendants [205] Florence Lowe Barnes McKendry, also known as Pancho Barnes, and Pancho Barnes, doing business as Rancho Oro Verde, E. S. McKendry, and William Emmert Barnes appeared by their attorneys, Beardsley, Hufstedler & Kemble.

Due and lawful service of process was made upon the defendants Benjamin C. Hannam and Kathryn May Hannam, Desert Aero, Inc., Peter Thomas, State of California, and County of Kern. Neither Benjamin C. Hannam, Kathryn May Hannam, nor Desert Aero, Inc., appeared in said proceeding or at the aforesaid trial.

Witnesses on the part of plaintiff and defendants were sworn in the case and evidence, both oral and documentary, was introduced upon the issue of just compensation.

The matter was argued by counsel for the respective parties, and the jury instructed by the court; whereupon the jury retired, deliberated, and subsequently returned into court and rendered the following verdict:

“We, the jury, find the just compensation for the taking and condemnation of the property described in plaintiff’s complaint and declaration of taking on file herein and designated as Tracts Nos. L-2040, L-2043, L-2071 and L-2072, to be the sum of \$377,000.00.

“Dated: The 23rd day of June, 1956.

Roy H. Gerard,

Foreman.”

The court, upon the pleadings, the record herein, the evidence, and verdict of the jury, and good cause appearing therefor, makes and files the following

Findings of Fact

This proceeding was duly and regularly commenced by the plaintiff on February 27, 1953, by the filing of its Complaint in Condemnation and Declaration of Taking herein to acquire the title and estates in and to the property therein more particularly [206] described, and for convenience designated as Tracts Nos. L-2040, L-2043, L-2071, and L-2072, and simultaneously deposited into the registry of this court the following sums for the use and benefit of the parties entitled thereto for the taking and condemnation of said properties:

Tract Number	Amount on Deposit
L-2040	\$ 33,500.00
L-2043	29,000.00
L-2071	2,000.00
L-2072	140,500.00
	<hr/>
	\$205,000.00

The record title to Tracts Nos. L-2040 and L-2072 stood in the name of E. S. McKendry. Record title to Tract No. L-2043 stood in the name of William Emmert Barnes. Tract No. L-2071, a 40-acre tract

lying immediately south of Tract No. L-2040, was acquired by the defendant Florence Lowe Barnes McKendry, also known as Pancho Barnes, by purchase from the defendants Benjamin C. Hannam and Kathryn May Hannam at the same time she purchased Tract No. L-2040 from them. By inadvertence the conveyance failed to describe Tract No. L-2071, and a corrective deed conveying said property to the said defendant Florence Lowe Barnes McKendry, also known as Pancho Barnes, was executed and delivered but has been lost or destroyed. The defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, and E. S. McKendry have been in continuous and uninterrupted open, notorious and adverse possession of said Tract No. L-2071 for more than 25 years preceding the filing of the Declaration of Taking herein, and the defendant E. S. McKendry was then the true and lawful owner thereof. During all of such period of adverse possession of said Tract No. L-2071, the defendants Pancho Barnes and E. S. McKendry paid all real property taxes assessed upon said property.

The aforesaid tracts were unitized in use and were valued [207] as of February 27, 1953, and as though in a single ownership.

The State of California and the County of Kern appeared herein and asserted certain liens for taxes, and under the State Unemployment Insurance Act, which are provided for in orders heretofore made herein and by this final judgment.

The defendant Peter Thomas appeared herein

and asserted a valid and subsisting judgment lien. The judgment was entered in Case No. 1232, Justice Court, Mojave Judicial District, Kern County, California, on March 15, 1952, against Florence L. Barnes in the amount of \$45.75, which must and will be paid and discharged from and out of the registry deposits.

The balance of the mortgage lien held by the Farmers and Merchants Trust Company of Long Beach, as trustee, created by trust deed dated January 30, 1950, by William Emmert Barnes, a single man, to secure an indebtedness to Farmers and Merchants Bank of Long Beach, in the original principal amount of \$13,000.00, recorded April 7, 1950, in Book 1558 at Page 371 of the Official Records of Kern County, California, has been fully paid and discharged from and out of the registry deposits herein and has been canceled and released of record.

The defendant Layne & Bowler Corporation's interest was limited to certain personal property, as the vendor under the conditional sales contract recorded in Book 1801 at Page 531 of the Official Records of Kern County, California. The personal property covered and affected thereby was not taken or condemned. Layne & Bowler Corporation, having disclaimed, is not entitled to any compensation for the condemnation herein.

The defendants Benjamin C. Hannam and Kathryn May Hannam and Desert Aero, Inc., did not hold or own any interest of any kind, character or description in any or either of the properties con-

condemned herein at the time of the taking and condemnation thereof, and are not entitled to any part of the compensation payable therefor. [208]

On July 25, 1956, plaintiff United States of America made a supplemental deposit in the registry of this court in this case in the amount of \$112,500.00.

That on August 27, 1953, plaintiff moved for the entry of an order of possession of the properties condemned herein; the defendants resisted said application and contested the plaintiff's right to condemn the properties and the validity of the proceedings. By order dated March 19, 1954, the Court ordered that the defendants surrender possession of the premises to the plaintiff at 12:00 o'clock noon on May 22, 1954. On the 28th day of April, 1954, defendants moved for the entry of an order to modify said order of possession. By order filed June 7, 1954, the Court extended the date of surrender of possession to the plaintiff from May 22, 1954 to July 24, 1954. By stipulation and agreement of the parties the time of surrender of possession was extended to August 7, 1954. Plaintiff was granted possession of the properties, effective as of 5:00 p.m. August 7, 1954. Said orders contained no conditions or provisions requiring the payment of rent notwithstanding the insistence of plaintiff that said orders contain some provision obligating the defendants to pay rent during the period of possession. Testimony was taken upon the matters set forth in this paragraph on September 9, October 27 and 28, 1953, February 23 and 24, 1954, and May

10, 1954. The defendants' several motions attacking the validity of the proceedings and plaintiff's right to condemn were denied.

During the period after the filing of the Declaration of Taking and before the defendants surrendered possession of the premises and on, to wit, November 14, 1953, two of the structures on the property, to wit, the dance hall and defendants' residence, were destroyed by fire. They were, however, included in the valuation as of February 27, 1953.

Certain of the plumbing fixtures, doors, heaters, air [209] conditioners, pumps, and motors which were upon and attached to the property on February 27, 1953, and which were also included in the valuation as of that date, were claimed missing at the time of the surrender of possession by defendants.

On May 31, 1956, after argument of counsel of record for plaintiff and for the defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes, a pretrial order was made and entered herein which, among other things, provided:

"That upon the trial of this case, to commence on June 5, 1956, before the court and a jury to be selected, the sole and only issue to be submitted to the jury for determination is the fair market value, as of February 27, 1953, of the real property taken and condemned herein, a more particular description of which is set forth in the Complaint and Declaration of Taking filed herein on February 27, 1953.

"At a date to be fixed by the court following the trial hereinabove mentioned, the court, without a jury, will hear and determine the amount, if any, by which the fair market value, as determined by the jury, shall be reduced as a result and by reason of:

"(a) the destruction of one or more of the improvements on the property after the filing of the Declaration of Taking herein and before the defendants surrendered possession thereof;

"(b) the removal from the property condemned of certain fixtures which were in place and part of the property condemned, and which were removed after the filing herein of the Declaration of Taking and before the surrender of possession by the defendants;

"(c) the fair market rental value of the use and [210] occupancy by the defendants from and after the filing herein of the Declaration of Taking to and until August 7, 1954, the date of the surrender of possession.

"At the court hearing upon the collateral issues, at (a), (b) and (c) above referred to, the court will also determine whether and how much interest shall be allowed on any deficiency which may be established by the verdict as to any or either of the parcels condemned, having particular reference to the title impediments and defects presently existent hereon."

After the trial to the jury of the issue of just compensation, that is to say, the fair market value as of February 27, 1953, of the real property taken and condemned herein, and on, to wit, July 25, 1956

and August 1, 1956, the court, having heard and considered the argument of counsel of record for the plaintiff and for the defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes, made and entered herein an order which, among other things, provided:

“That this court is without power or jurisdiction to hear and determine the matters set forth in subparagraphs (a) and (b) of paragraph 4 of the Pre-trial Order filed and entered herein on May 31, 1956, as follows, to wit:

“ ‘The amount, if any, by which the fair market value, as determined by the jury, shall be reduced as a result and by reason of:

“ ‘(a) the destruction of one or more of the improvements on the property after the filing of the Declaration of Taking herein and before the defendants surrendered possession thereof;

“ ‘(b) the removal from the property condemned of certain fixtures which were in place and part [211] of the property condemned, and which were removed after the filing herein of the Declaration of Taking and before the surrender of possession by the defendants.’ ”

Thereafter and on, to wit, September 18, 1956, the Court without a jury heard testimony as to the fair market rental value of the use and occupancy of the premises on and after the filing of the Declaration of Taking herein, to and including August 7, 1954, the date of surrender of possession by the defendants, and certain title questions concerning Tract

No. L-2071; that on September 26, 1956, the Court made and entered herein an order which, among other things, provided:

“It is my view that I cannot at this late date, which is more than two years from the surrender of possession by the defendants to the plaintiff, enter any such order. In my opinion, I am precluded from so doing by the hearings held before Judge Beaumont and the orders made by him in relation hereto.

“It is therefore determined that the fair market value of the premises in question as determined by the jury shall not be reduced as a result or by reason of the fair market rental value, if any, of the use and occupancy by the defendants of the premises in question from and after the filing of the declaration of taking.”

Heretofore and during the progress of this proceeding there has been distributed to or for the account of the defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes, the following sums:

Date	Amount Distributed
3/12/53	\$185,000.00
4/6/53	9,402.73
8/29/55	1,900.00 [212]
11/6/55	733.07
9/18/56	112,500.00
	<hr/>
	\$309,535.80

Based upon the preceding Findings of Fact, the court makes the following

Conclusions of Law

At the time of filing the Declaration of Taking herein on February 27, 1953, with the accompanying deposit, fee simple title to the property therein more particularly described and for convenience designated as Tracts Nos. L-2040, L-2043, L-2071, and L-2072, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines, vested in the plaintiff United States of America.

The uses and purposes for which the plaintiff acquired said tracts are public uses and are authorized by law.

At the time of the filing of said Declaration of Taking on February 27, 1953, the right to just compensation for the taking and condemnation of said properties vested in the defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes.

That just compensation for the taking and condemnation of the properties and estates therein described in the Declaration of Taking and for convenience designated as Tracts Nos. L-2040, L-2043, L-2071, and L-2072, is the sum of \$377,500.00, together with interest at the rate of 6% per annum on the sum of \$172,500.00 from February 27, 1953, to and until July 25, 1956, upon which date the plaintiff deposited into the registry of this court the further sum of \$112,500.00, and interest at the rate

of 6% per annum upon the sum of \$60,000.00 from July 25, 1956, until paid into the registry of this court.

That the plaintiff, United States of America, is not entitled to a reduction in amount or abatement of the fair market [213] value of the properties taken and condemned herein as a result or by reason of:

(a) The destruction of one or more of the improvements on the property after the filing of the Declaration of Taking herein and before the defendants surrendered possession thereof;

(b) The claimed removal from the property condemned of certain fixtures which were in place and a part of the property condemned, and which were missing after the filing of the Declaration of Taking and before the surrender of the property by defendants;

(c) The fair market rental value of the use and occupancy by the defendants of the property condemned from and after the filing herein of the Declaration of Taking, to and including August 7, 1954, the date of surrender of possession of the property by the defendants.

The defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes are entitled to interest at the rate of 6% per annum upon the deficiency created by the aforesaid verdict.

That neither of the defendants Desert Aero, Inc., Layne & Bowler Corporation, Farmers and Merchants Trust Company of Long Beach, Farmers and

Merchants Bank of Long Beach, Benjamin C. Hannam and Kathryn May Hannam, or any or either of them, had, or has, any interest in and to any or either of the tracts of land taken and condemned herein, and are not entitled to any part of the compensation payable for the taking and condemnation thereof.

Based upon the preceding Findings of Fact and Conclusions of Law, it is hereby

Adjudged, Ordered and Decreed:

That the plaintiff, United States of America, is entitled [214] to condemn the properties and estates therein more particularly described in the Complaint in Condemnation and Declaration of Taking filed herein, and for convenience designated as Tracts Nos. L-2040, L-2043, L-2071, and L-2072, for the public uses set forth in said Complaint and Declaration of Taking.

The just compensation for the taking and condemnation of said properties is the sum of \$377,500.00, together with interest at the rate of 6% per annum on the sum of \$172,500.00 from February 27, 1953, to and until July 25, 1956, upon which date the plaintiff deposited into the registry of this court the further sum of \$112,500.00, and interest at the rate of 6% per annum upon the sum of \$60,000.00 from July 25, 1956, until paid into the registry of this court.

Plaintiff, United States of America, is directed to deposit into the registry of this court, with respect to the taking and condemnation of said properties, the deficiency in the amount of \$60,000.00, together

with interest at the rate of 6% per annum on the sum of \$172,500.00 from February 27, 1953, to and until July 25, 1956, and interest at the rate of 6% per annum on the sum of \$60,000.00 from and after July 25, 1956, until paid into the registry of this court.

It is further Adjudged, Ordered and Decreed that upon the payment of said deficiency with interest computed as aforesaid the clerk of this court is hereby authorized and directed to pay from and out of the registry of this court, to the defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes, the balance of the funds so deposited on account of the just compensation for the taking and condemnation as aforesaid, save and except the sum of \$4,753.14, which is to be held and retained in the registry pursuant to the orders of this court, entered herein on the 18th day of October, 1955, and the 21st day of October, 1955, segregating certain registry [215] funds for the purposes therein more particularly set forth, and the further sum of \$45.75, together with interest thereon at the rate of 7% per annum from and after March 12, 1952, to and until the date hereof, which said sum with interest so computed shall be forthwith paid to Peter Thomas.

All taxes claimed by the County of Kern, State of California, upon and against the properties taken and condemned herein have been fully paid and discharged.

It is further Adjudged, Ordered and Decreed that plaintiff's claims for the reduction or abatement of

the fair market value of the properties taken and condemned herein, as determined by the jury, as a result and by reason of (a) the destruction of one or more of the improvements on the property after the filing of the Declaration of Taking herein and before the defendants surrendered possession thereof; (b) the removal from the property condemned of certain fixtures which were in place and part of the property condemned, and which were removed after the filing herein of the Declaration of Taking and before the surrender of possession by the defendants; and (c) the fair market rental value of the use and occupancy by the defendants from and after the filing herein of the Declaration of Taking to and until August 7, 1954, the date of the surrender of possession, be, and each of same are, hereby denied.

Dated: This 8th day of November, 1956.

/s/ GILBERT H. JERTBERG,
United States District Judge.

Presented by: Laughlin E. Waters, United States Attorney, Joseph F. McPherson, Albert N. Minton, Assistant U. S. Attorneys, by Joseph F. McPherson, Attorneys for Plaintiff, United States of America.

Approved as to form: Beardsley, Hufstedler & Kemble, by Seth M. Hufstedler, Attorneys for Defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes. [216]

[Endorsed]: Lodged Nov. 1, 1956. Filed Nov. 8, 1956. Docketed and Entered No. 13, 1956.

[Title of District Court and Cause No. 1253-ND.]

MOTION FOR NEW TRIAL

Defendants E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, and William Emmert Barnes, move this Court to set aside the verdict and judgment herein, and to grant a new trial of the issue of the just compensation to be awarded to said defendants for the real property involved herein, upon the following grounds:

1. Errors in law occurring at the trial;
2. Insufficiency of the evidence to justify the verdict.

Such motion will be based upon this Motion for New Trial, and the Points and Authorities submitted herewith, and upon the evidence received and excluded during the trial of the above-entitled matter before the Jury, and the rulings of Court thereon; and the written offer of proof filed by defendants regarding the offer to purchase the real property in question by one Tommy Lee.

The particular errors relied upon are specified as follows: [217]

1. The ruling of the Court in refusing to admit evidence of prior offers to purchase the real property in question, and in particular, the refusal to receive evidence of the offer to purchase by Tommy Lee, and the circumstances surrounding said offer.

2. The ruling of the Court excluding evidence offered from the witness Hugh McNulty, regarding the costs of construction of certain improvements in accordance with specifications submitted.

3. The ruling of the Court admitting as evidence information regarding the sales of other real property near to the property involved, as “comparable sales”, by the government experts on evaluation. This specification is based upon the argument that such sales were not “comparable sales”.

Defendants contend that the evidence was insufficient to justify the verdict in this action in that the evidence of value of the property submitted by witnesses by the plaintiff was based upon “comparable sales”, which, in fact, were not comparable. Without consideration of such evidence, the evidence was insufficient to justify the award actually made.

Dated: November 23, 1956.

BEARDSLEY, HUFSTEDLER
& KEMBLE,

/s/ By SETH M. HUFSTEDLER,
Attorneys for defendants, E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, and William Emmert Barnes. [218]

Acknowledgment of Receipt of Copy Attached. [219]

[Endorsed]: Filed Nov. 23, 1956.

[Title of District Court and Cause No. 1253-ND.]

AMENDMENT OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT IN CONDEMNATION (As to Tracts Nos. L-2040, L-2043, L-2071, and L-2072)

An inspection of the records of this court discloses that an error in computation was made in the disbursement portion of the Findings of Fact, Conclusions of Law, and Final Judgment in Condemnation, filed herein on November 8, 1956, docketed and entered November 13, 1956, and, in order to make said Findings of Fact, Conclusions of Law, and Final Judgment in Condemnation speak the truth concerning the orders therein referred to, entered October 18, 1955, and October 21, 1955, the court, of its own motion, amends said Findings of Fact, Conclusions of Law, and Final Judgment in Condemnation, by deleting from Line 29, on Page 11 thereof, the figure "\$4,753.14," and substituting in place and in lieu thereof the figure "\$5,964.20."

Done and Ordered at Los Angeles, California, this 10th day of December, 1956.

/s/ GILBERT H. JERTBERG,

United States District Judge. [199]

Presented by: Laughlin E. Waters, United States Attorney, Joseph F. McPherson, Assistant U. S. Attorney, by Joseph F. McPherson, Attorneys for Plaintiff.

Approved: Beardsley, Hufstedler & Kemble, by

Seth M. Hufstedler, Attorneys for Defendants Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes. [200]

Docketed and Entered Dec. 14, 1956.

[Endorsed]: Filed Dec. 10, 1956.

[Title of District Court and Cause No. 1253-ND.]

ORDER DENYING MOTION FOR NEW TRIAL

The motion of defendants, E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, and William Emmert Barnes to set aside the verdict and judgment herein and to grant a new trial of the issue of the just compensation to be awarded said defendants for the real property involved herein, came on for hearing before the Court on December 10, 1956. The plaintiff was represented by Laughlin E. Waters, United States Attorney, Joseph F. McPherson and Albert N. Minton, Assistant United States Attorneys, Joseph F. McPherson appearing, and the defendants were represented by Beardsley, Hufstedler and Kemble, Seth M. Hufstedler appearing. The matter was orally argued by Mr. Hufstedler and Mr. McPherson, and the motion was submitted to the Court for its decision. [220]

I have considered the oral arguments presented at the hearing and the legal memoranda theretofore

filed and I have carefully reviewed the record. I am convinced that the verdict of the jury in this case constituted just compensation and that the evidence is amply sufficient to justify the verdict. I am likewise convinced that no errors in law occurred during the trial of the action which would justify setting aside the verdict and judgment herein or the granting of a new trial. It is my view that none of the alleged errors of law occurring during the trial affected the substantial rights of the defendants, or that the verdict is inconsistent with substantial justice.

The motion of the defendants to set aside the verdict and judgment and to grant a new trial is therefore denied.

The Clerk of this Court is directed to forthwith mail copies of this order to all counsel.

Dated: December 13, 1956.

/s/ GILBERT H. JERTBERG,

Judge, U. S. District Court. [221]

Docketed and Entered Dec. 17, 1956.

[Endorsed]: Filed Dec. 13, 1956.

[Title of District Court and Cause No. 1253-ND.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(B)

Notice Is Hereby Given that E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes, and William Emmert Barnes, defendants

above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that judgment entered in the above-entitled action on November 13, 1956, and in particular from that paragraph thereof beginning at page 10, line 32, and ending at page 11, line 5, which provides as follows:

“That the plaintiff, United States of America, is entitled to condemn the properties and estates therein more particularly described in the Complaint in Condemnation and Declaration of Taking filed herein, and for convenience designated as Tracts Nos. L-2040, L-2043, L-2071, and L-2072, for the public uses set forth in said Complaint and Declaration of Taking.”

In addition thereto, the said defendants hereby appeal from the following specified orders of said court, in the above-entitled [222] Proceeding, insofar as said orders may have any force or effect:

1. The order docketed and entered on March 23, 1954, denying defendants' motion to set aside the Declaration of Taking and vacate and set aside the ex parte judgment dated March 2, 1953, and denying the motion by defendants to dismiss.

2. The order docketed and entered on October 17, 1955, denying the defendants' motion to set aside the Declaration of Taking and vacate and set aside the ex parte judgment entered thereon dated March 2, 1953, and denying the defendants' motion to dismiss.

Dated: February 11, 1957.

BEARDSLEY, HUFSTEDLER
& KEMBLE,

/s/ By SETH M. HUFSTEDLER,

Attorneys for E. S. McKendry, Florence Lowe
Barnes, also known as Pancho Barnes, and
William Emmert Barnes. [223]

[Endorsed]: Filed Feb. 11, 1957.

[Title of District Court and Cause No. 1253-ND.]

STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

Appellants have appealed from the orders of the court in the above-entitled matter dated March 22, 1954, and October 17, 1955, which overruled appellants' motion to dismiss the complaint and to set aside the declaration of taking and vacate the ex-parte judgment based thereon, and from that portion of the final judgment which, in effect, approves such orders, and affirms the right of the Government to condemn the subject property. Appellants, by this appeal, raise the right of the Government to take the subject property in the above-entitled proceeding.

The points relied upon are set forth in full in the motions denied by the above-mentioned orders. Those motions were the motion to dismiss the complaint, filed September 5, 1953; the motion to set aside the declaration of taking, filed September 5, 1953; the supplemental amendments to motion to set aside declaration of taking and to vacate and set

aside ex-parte judgment, filed February 23, 1954; [224] the supplemental amendment to dismiss, filed February 23, 1954; the motion to dismiss, filed April 22, 1955; the motion to set aside the declaration of taking, dated February 27, 1953, and to vacate and set aside the ex-parte judgment entered thereon, dated March 2, 1953, which motion was filed April 22, 1955; the supplement to motion to dismiss, including more definite statement, filed June 1, 1955; and the supplement in addition to motion to set aside declaration of taking and to vacate and set aside ex-parte judgment entered thereon, filed June 1, 1955.

These points may be summarized as follows:

1. The Assistant Secretary of the Air Force and the Secretary of the Air Force acted arbitrarily and capriciously, and in bad faith in causing the within action to be instituted and in the preparation and filing of the Declaration of Taking.

2. The taking of the subject property was not authorized by Public Law 564, approved June 19, 1950, nor was it authorized by any other appropriate statute.

3. There was no necessity to take the condemned property for use in connection with Edwards Air Force Base, or for other legal use.

4. The deposit made in connection with the Declaration of Taking was inadequate, and known to be so, or should have been known to be so, by the Assistant Secretary of the Air Force at the time the Declaration of Taking was executed.

5. The Declaration of Taking and Ex-Parte Judgment entered thereon were rendered invalid by virtue of unauthorized alterations and unauthorized use of the Declaration of Taking herein.

Dated: March 20, 1957.

BEARDSLEY, HUFSTEDLER
& KEMBLE,

/s/ By SETH M. HUFSTEDLER,
Attorneys for Above Named
Defendants. [225]

Affidavit of Service by Mail Attached. [226]

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause No. 1253-ND.]

DESIGNATION OF RECORD
ON APPEAL

Come now the defendants and designate the following as the record on appeal:

1. Declaration of Taking, with attached schedule, filed February 27, 1953.
2. Complaint, filed February 27, 1953.
3. Amended Answer, filed December 5, 1955.
4. Decree on Declaration of Taking, filed March 2, 1953.
5. Motion to Strike Portions of Answer, filed November 18, 1955.
6. Order Granting Plaintiff Motion Striking

Portion of Defendants' Original Answers, and Granting Defendants Leave to File Proffered Amended Answer with Portions thereof Stricken, filed December 21, 1955.

7. Motion to Dismiss Complaint (excluding Points and Authorities) filed September 5, 1953.

8. Motion to Set Aside Declaration of Taking (excluding Points [228] and Authorities), filed September 5, 1953.

9. Supplemental Amendments to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex-Parte Judgment (excluding Points and Authorities), filed February 23, 1954.

10. Supplemental Amendment to Motion to Dismiss, filed February 23, 1954.

11. Memorandum of Opinion and Order, filed March 22, 1954.

12. Opinion of Court of Appeal for Ninth Circuit, Appeal No. 14,380, dated January 31, 1955.

13. Notice of Motion to Dismiss, filed April 22, 1955.

14. Motion to Dismiss, filed April 22, 1955.

15. Notice of Motion to Set Aside Declaration of Taking and To Vacate and Set Aside Ex-Parte Judgment (excluding Points and Authorities), filed April 22, 1955.

16. Motion to Set Aside Declaration of Taking and to Vacate and Set Aside the Ex-Parte Judgment entered thereon (excluding Points and Authorities), filed April 22, 1955.

17. Affidavits of Pancho Barnes and E. S. McKendry, filed April 27, 1955.

18. Supplemental Specific Information on Motion to Dismiss and To Set Aside Declaration of Taking, filed May 12, 1955.

19. Supplement to Motion to Dismiss, including more definite statement, filed June 1, 1955.

20. Supplements in addition to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex-Parte Judgment entered thereon, filed June 1, 1955.

21. Opposition to Motion to Dismiss and Motion to Set Aside Declaration of Taking and Judgment Thereon, filed June 13, 1955.

22. Affidavit of Richard A. Lavine, Re: File of United States Attorney's Office, with Exhibits, filed June 17, 1955.

23. Affidavit of August Weymann, filed June 17, 1955.

24. Answering Affidavit to all Affidavits Filed by Government [229] Witnesses, filed July 5, 1955.

25. Affidavit of Col. Robert P. Foley, filed June 17, 1955.

26. Affidavit of Col. Marion J. Akers, filed June 17, 1955.

27. Affidavit of Brig. Gen. Holtoner, filed June 17, 1955.

28. Order and Opinion of District Court on Motion to Dismiss the Complaint and Motion to Set Aside the Declaration of Taking and to Vacate and Set Aside the Ex-Parte Judgment thereon, filed October 17, 1955.

29. Minutes of Court dated June 6, 1955, in which Court ordered Defendants' Subpoena Duces Tecum quashed.

30. Findings of Fact and Conclusions of Law and Judgment by Honorable James Carter, in Civil No. 15403-C, dated September, 1954.

31. Deposition of Eugene S. McKendry, taken on behalf of Defendants, dated November 19, 1953.

32. Deposition of Jules F. Koch, taken on behalf of defendants, dated November 17, 1953.

33. Deposition of E. B. Hatcher, taken on behalf of defendants, dated November 19, 1953.

34. Deposition of Joseph Stanley Holtoner, taken on behalf of defendants, dated May 19, 1954.

35. Depositions of Pancho Barnes, E. S. McKendry, and William Emmert Barnes, taken by United States on May 8, 1956.

36. Reporter Transcript of the hearings before the Honorable Campbell Beaumont, on September 9, 1953; October 27, 28, 30, 1953; February 23, 24, 25, 1954; May 10, 1954.

37. Reporter Transcript of the hearings before the Honorable Gilbert H. Jertberg, held on May 2, 23, 1955; June 16, 17, 1955; December 5, 1955.

38. All exhibits introduced into evidence and all exhibits marked for identification by and on behalf of defendants in each and all of the hearings hereinabove mentioned.

39. All exhibits introduced into evidence by and on behalf of [230] the plaintiff in each and all of the hearings hereinabove mentioned.

40. Findings of Fact and Conclusions of Law and Judgment entered in ND-1253, the above entitled action, filed November 8, 1956.

41. Motion for New Trial, filed November 23, 1956.

42. Order Amending Findings of Fact, Conclusions of Law, and Judgment, filed December 10, 1956.

43. Order Denying Motion for New Trial, filed December 13, 1956.

44. Notice of Appeal filed February 11, 1957.

45. This Designation of Record on Appeal.

Dated: March 19, 1957.

BEARDSLEY, HUFSTEDLER
& KEMBLE,

/s/ By SETH M. HUFSTEDLER,
Attorneys for Above Named
Defendants. [231]

Affidavit of Service by Mail Attached. [232]

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause No. 1253-ND.]

NOTICE

To the Above Named Defendants:

You Are Hereby Notified that a Complaint in Condemnation has been filed in the office of the Clerk of the above entitled Court, in an action to condemn an estate in fee simple in the property hereinafter described for public use for military purposes.

The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C., [233] Sec. 257); and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C., 1343a, b, and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 28, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress); and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes.

You Are Further Notified that if you have any objection or defense to the taking of your property, you are required to serve upon plaintiff's attorneys at the address designated herein, within twenty (20) days after personal service of this notice upon you, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the Court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You Are Further Notified that if you have no objection or defense to the taking, you may serve upon plaintiff's attorneys a notice of appearance designating the property in which you claim to be interested and thereafter you shall receive notice of all proceedings affecting the said property.

And You Are Further Notified that at the trial of the issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation [234] to be paid for the property in which you have any interest and you may share in the distribution of the award of compensation.

The land herein sought to be acquired is situate in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management, and for con-

venience has been divided into four (4) tracts, each of which said tracts is particularly described as follows:

Tract L-2040: West Half ($W1\frac{1}{2}$) of the Northwest Quarter ($NW1\frac{1}{4}$); Northeast Quarter ($NE1\frac{1}{4}$) of the Northwest Quarter ($NW1\frac{1}{4}$); West Half ($W1\frac{1}{2}$) of the Southeast Quarter ($SE1\frac{1}{4}$) of the Northwest Quarter ($NW1\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M.

Tract L-2043: West Half ($W1\frac{1}{2}$) of the Northeast Quarter ($NE1\frac{1}{4}$); East Half ($E1\frac{1}{2}$) of the Southeast Quarter ($SE1\frac{1}{4}$) of the Northwest Quarter ($NW1\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M.

Tract L-2071: Northwest Quarter ($NW1\frac{1}{4}$) of the Southwest Quarter ($SW1\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M.

Tract L-2072: East Half ($E1\frac{1}{2}$) of the Northeast Quarter ($NE1\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M.

Dated: March 4, 1953.

WALTER S. BINNS,

United States Attorney,

A. WEYMANN,

Special Attorney, Lands Division,

Department of Justice,

/s/ By A. WEYMANN,

Attorneys for Plaintiff. [235]

Returns on Service of Writ Attached. [236-238]

[Endorsed]: Filed Apr. 4, 1957.

[Title of District Court and Cause No. 1253-ND.]

AMENDED & SUPPLEMENTAL DESIGNA-
TION OF RECORD ON APPEAL

Come now the defendants and amend and supplement their designation of record on appeal as follows:

1. Delete from said designation Government's Exhibit 3 introduced in evidence June 17, 1955, which said exhibit was the Air Force Master Plan, withdrawn by the Government on or before the termination of the hearing of said date.

2. Delete defendants' Exhibits 12 and 14, marked for identification only, in hearing, of February 24, 1954.

3. Add to the record the Notice of Filing Condemnation Action, filed April 4, 1957; said filing date being after Notice of Appeal was herein made and filed.

4. This Amended and Supplemental Designation of Record on Appeal.

Dated: June 6, 1957.

BEARDSLEY, HUFSTEDLER &
KEMBLE,

/s/ By SETH M. HUFSTEDLER,
Defendants above named. [241]

Affidavit of Service by Mail Attached. [242]

[Endorsed]: Filed June 7, 1957.

[Title of District Court and Cause No. 1253-ND.]

CERTIFICATE BY CLERK

I, John A. Childress, clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 242, inclusive, containing the original:

Complaint;

Declaration of Taking;

Decree on Declaration of Taking;

Motion and Notice of Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment;

Motion and Notice of Motion to Dismiss;

Supplemental Amendment to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment;

Supplemental Amendment to Motion to Dismiss;

Memorandum of Opinion and Orders;

Findings of Fact and Conclusions of Law;

Judgment;

Advance Sheet of Court of Appeals on Ruling on Appeals 1 and 2 in this case;

Advance Sheet of Court of Appeals on Ruling on Appeal 3 in this case;

Motion and Notice of Motion to Dismiss;

Motion and Notice of Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment;

Affidavit of Pancho Barnes and E. S. McKendry;
Supplemental Specific Information on Motion to Dismiss and Motion to Set Aside Declaration of Taking as Requested by Mr. McPherson, Assistant U. S. Attorney;

Supplement to Motion to Dismiss Including More Definite Statement;

Supplement in Addition to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment Entered Thereon;

Opposition to Motion to Dismiss and Motion to Set Aside Declaration of Taking and Judgment Thereon;

Affidavit of Richard A. Lavine re Files of United States Attorney's Office;

Affidavit of August Weymann;

Affidavit of Lt. Colonel Robert P. Foley;

Affidavit of Colonel Marion J. Akers;

Affidavit of Brig. General J. S. Holtoner;

Answering Affidavit to all Affidavits filed by Government witnesses in the last 11½ days of the hearings of June 16 and 17, 1955, as per instructions of the Court.

Orders on Motion to Dismiss the Complaint and Motion to Set Aside the Declaration of Taking and to Vacate and Set Aside the Ex Parte Judgment entered thereon;

Motion to Strike Portions of Answer of Pancho Barnes; Motion to Strike Portions of Answer of Pancho Barnes, E. D. McKendry, and William Emmert Barnes; Notice of Motions, and Memorandum of Points and Authorities;

Amended Answer;

Amendment of Findings of Fact, Conclusions of Law, and Final Judgment;

Order Granting Plaintiff's Motion Striking Portions of Defendants' Original Answers; Granting Defendants' Leave to File Proffered Amended Answer with portions thereof stricken;

Findings of Fact, Conclusions of Law, and Final Judgment;

Motion for New Trial;

Order Denying Motion for New Trial;

Notice of Appeal;

Statement of Points to Be Relied Upon on Appeal;

Order Extending Time for Filing Record and Docketing Appeal;

Designation of Record on Appeal;

Notice and Return thereof of filing Complaint in Condemnation;

Amended and Supplemental Designation of Record on Appeal; and a full, true and correct copy of the Minutes of the Court had on June 6, 1955;

B. Reporter's transcript of proceedings (13 volumes) for: September 9, 1953; October 27, 28, 30, 1953; February 23, 24, 25, 1954; May 10, 1954; May 2, 23, 1955; June 16, 17, 1955; December 5, 1955;

C. Depositions of Jules F. Koch, Eugene S. McKendry, Florence Lowe Barnes McKendry, E. S. McKendry, and William Emmert Barnes;

D. Plaintiff's exhibits—Number and year offered: 1, 1954 and 1955; 2, 1954 and 1955 (jointly 1953;

2A, 1955; 3, 1954 and 1956; 4, 1956; 5, 1955; 6, 1953 and 1954 and 1956; 8, 1953; 11, 1953; 13, 1953; 26, 1956; 27, 1956; 28, 1956; 35, 1956; 36, 1956.

Plaintiff's exhibits from case No. 15403-C now exhibits of plaintiff 2, 3, 4, 1954.

Riddell's exhibit No. 1.

Defendants' exhibits—Number and year offered:

A, 1955; B, 1955; C, 1955; D, 1955; E, 1955; G, 1955; H, 1955; K, 1955; L, 1955; M, 1955; N, 1956.

Defendants' numbered exhibits and year offered:

1, 1953; 3, 1953 (jointly with plaintiff); 4, 1953 (jointly with plaintiff); 10, 1953; 12, 1954; ZZZ-6, 1956; ZZZ-7, 1956; ZZZ-8, 1956; ZZZ-28, 1956.

I further certify that my fee for preparing the foregoing record amounting to \$2.00, has been paid by appellant.

Witness my hand and seal of the said District Court this 11th day of June, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ By CHARLES E. JONES,
Deputy.

In the United States District Court, Southern
District of California, Northern Division

No. 1253-ND Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

360 ACRES OF LAND IN THE COUNTY OF
KERN, State of California, E. S. McKEN-
DRY, et al., Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Fresno, California

September 9, 1953

Honorable Campbell E. Beaumont, Judge pre-
siding.

Appearances: For the Plaintiff: Laughlin E.
Waters, Esq., United States Attorney, by August
Weymann, Esq., Special Assistant. For the Defend-
ants: Mrs. Pancho Barnes, E. S. McKendry and
William Emmert Barnes, each appearing in propria
persona. [1]*

Tuesday, September 9, 1953, 10:00 a.m.

(Other court matters.)

The Court: Call the next case.

The Clerk: No. 1253, United States of America

* Page numbers appearing at top of page of Reporter's Orig-
inal Transcript of Record.

vs. Lands in the County of Kern. Motion for immediate possession.

Mr. Weymann: Ready, your Honor.

Mrs. Barnes: Ready, your Honor.

The Court: What is this matter, Mr. Weymann?

Mr. Weymann: This is a motion for immediate possession of four parcels of land in connection with the Flight Test Center at the Edwards Air Force Base.

The Court: It is only an order for immediate possession——

Mr. Weymann: It is only an order for immediate possession.

The Court: ——of four parcels of land?

May I have the file, please?

The Clerk: If the Court please, I don't have the original papers in this action at all. I have the Court's copy of the complaint, and two motions that were received this morning, filed by the defendants or one of them.

The Court: They are not to be heard this morning?

Mrs. Barnes: Your Honor,—— [2]

The Court: Wait a minute.

The Clerk: No, these motions are not to be heard this morning.

The Court: When are they set for?

The Clerk: They are set for September 21st. The copy of the complaint is in here, but I don't have—they haven't sent me up the original documents in any of these two. I don't have anything but the copies.

The Court: Now you may be heard.

Mrs. Barnes: This order for immediate possession was supposed to come up this morning, your Honor, but I have filed—that is, myself, or the three of us in pro per, all my family—we have filed a motion for dismissing the condemnation suit on proper grounds, and I think the order will be granted; also the order to set aside declaration of taking, an ex parte judgment, made on very good grounds, your Honor, that have been backed up in many cases.

It seems we have a motion here this morning for possession of land, which is putting the cart before the horse, because there is a motion on file to be heard the 21st, which I understood would be your first available date. I inquired of the Clerk's office down town, and was told that would be your first available date, and I set the motion for that time, and filed the papers the 5th of September, and I do think the other motion should be heard [3] before the order for possession, when there is a motion for an order dismissing the condemnation suit, also setting aside the declaration of taking.

It is going to be a long case, and will shock the conscience of the Court. It will be quite a long time before you will believe—you won't believe the atrocities in this thing. It is just unbelievable. I have to bring out a lot of other things in this hearing involving two other cases on trial. There is going to be quite an amount of evidence your Honor will have to go over, and a great many witnesses, before you can understand the picture, which, on the face

of it, will not be believable. But I do feel at this time the motion to take possession of the property should be continued until the motion to dismiss and the motion to set aside the declaration of taking can be heard, which come up the 21st of this month if it is all right with your Honor. I will appear then on the motion, and supplement it with witnesses, to set aside the declaration of taking, and the motion to dismiss.

The Court: What have you to say?

Mr. Weymann: I object strenuously to any continuance of this motion; and I am prepared now, also, to put Colonel Akers on the stand to show the necessity for the possession of this property.

I would like to call the Court's attention to the fact that a declaration of taking was filed in this case on [4] February 23d, and \$194,000 was paid to these defendants upon their petition for a partial distribution under the provisions of Section 258a of Title 40. It seems an anomalous position that these defendants should take almost \$200,000 from the government and then move to set aside the declaration of taking.

In any event, I believe it is beyond the jurisdiction of this Court to set aside the declaration of taking.

The Court: The Clerk has stated the papers are not here. I will ask Miss Barnes, is it true you have received this money?

Mrs. Barnes: Your Honor,——

The Court: Just answer "yes" or "no."

Mrs. Barnes: In part.

The Court: What?

Mrs. Barnes: In part; as much as necessity——

The Court: Did you get \$192,000?

Mrs. Barnes: No. As much as is——

The Court: Wait. How much did you get?

Mrs. Barnes: I would have to check my figures, your Honor. Anyway, what I want to say——

The Court: I don't want you to say anything until I have a chance to check these figures.

Mrs. Barnes: Okay.

The Court: Did you say \$192,000, Mr. Weymann?

Mr. Weymann: In March, \$185,000 was paid to or for the account of the defendants Pancho Barnes, E. S. McKendry and William Emmert Barnes.

The Court: Are they the defendants——

Mr. Weymann: They are the defendants.

The Court: ——that are opposing this motion?

Mr. Weymann: Yes.

Of that \$185,000, \$13,000 was at their direction paid to a bank at Long Beach.

The Court: Of the 185 thousand?

Mr. Weymann: Yes, of the 185 thousand.

The Court: I don't care about that.

Mr. Weymann: In addition, there was there-after, in the next month, \$9,402.73 paid to discharge liens of record, on the petition of these defendants, making \$194,402.73.

The Court: Is that shown in the records of this court?

Mr. Weymann: That is shown in the records of this court.

The Court: How does it happen the file was not sent here?

Mrs. Barnes: That is what I would like to know.

The Court: Just a minute. Please don't interrupt.

Mr. Weymann: That should have been sent up here, your Honor. I don't know why it wasn't sent up by the Clerk's office.

The Court: Now I will ask Miss Barnes, did you receive [6] \$185,000?

Mrs. Barnes: I don't know, your Honor, but I have received——

The Court: You heard Mr. Weymann's statement. Did you receive anything approximately like that?

Mrs. Barnes: I believe so, your Honor. I believe those figures may be correct.

The Court: And the \$9,402 was paid at your request?

Mrs. Barnes: I can't remember the figures, your Honor.

The Court: Approximately that?

Mrs. Barnes: I would say that Mr. Weymann's figures are probably correct. I don't think that is the question.

Your Honor, may I say something? We have practically been in the state of inverse condemnation for several years out there. The government has closed in on us in such a manner, with bad faith,——

The Court: No, don't say that.

Mrs. Barnes: This is in bad faith, and I can prove it.

The Court: Don't make those statements.

Mrs. Barnes: I will make the statement if our land is released to us by the government and we can positively know they won't turn around and take it again, I will return every penny paid out for that account. It was necessitated by the government's action, that we had to draw down certain money to protect ourselves. But should the government return all [7] the land intact, I will return all the money intact, which I am set up to do. I will bring in the figures on the 21st to show all money taken from that account can be immediately returned.

If that is done, I can see no objections, because the actions of the government have put us in the position where we did draw down the money; but we expected all the time the government might try to make a reasonable deal with us and not do something that would be highly unreasonable and highly capricious, such as to shock the conscience of the court. You wait until you see——

The Court: Now, Mr. Weymann, what is the necessity for hearing this matter?

Mr. Weymann: I would like to offer the testimony of Colonel Akers on that matter.

The Court: Make a statement.

Mr. Weymann: I expect to show by Colonel Akers, who is Chief of Staff at this station, that this property lies in the very center of the Edwards Air Force Base. Secret work is being carried on

there, classified work, and there is grave danger of an accident there, of crash landing of planes, and the possibility of injury to persons and the destruction of the property.

The Court: Now, do the defendants have property surrounding this place where you expect landings to be made? [8]

Mr. Weymann: They have property that is in the very center of the flight course.

Mrs. Barnes: I am afraid your Honor is going to be a little bit confused by that statement, because that statement really isn't correct.

Mr. Weymann: And I have Colonel Akers up here to go into the matter in detail.

The Court: Well, the difficulty is that I am expecting to leave Monday, the 14th, and not return until the middle of October.

Mr. Weymann: It is a matter of urgent necessity——

Mrs. Barnes: Your Honor,——

The Court: Wait a minute. Let Mr. Weymann finish his statement.

Mr. Weymann: It is a matter of urgent necessity that this order be granted and that the defendants be given a reasonable time to vacate the premises. Certainly the government should not be placed in the position of being liable for damages for the destruction of property or the injury to or death of people.

The Court: Can you give me the date, or the approximate date, when this \$185,000 was paid?

Mr. Weymann: Yes. I have my office file here on

the petition. March 11th or March 12th, Farmers and Merchants Bank of Long Beach, \$12,246.24, to E. S. McKendry as Trustee—— [9]

The Court: That is all right. When was the \$9,400 paid?

Mr. Weymann: Approximately April 7th, the 7th or 8th.

The Court: Now, what have you to say?

Mrs. Barnes: What I want to say is, your Honor, I have been there over twenty years on that land. I was there before the Air Force was, and they came in later. I have been working for them and with them during all those years.

During the war we had some 15,000 people on that air base, and I know the count because I delivered milk to them. I know the terrain very well, having been flying over twenty years myself. My husband and my son are both pilots. I was one of the first test pilots for Lockheed, and I flew over this territory before the Air Force was there. It was I that opened up that territory and suggested it to the Air Force as establishing it as a place to test airplanes. I went in and showed it to them.

During the war we had training planes there for training pilots, and B36s and P38s. I saw seven P38s burning at one time, and of course there were many others.

Their present runway doesn't point to our land at all. They are building a new runway which will be constructed and possibly ready to go in a definite time. They have contracts calling for the finishing of it in a certain time.

The Court: What is the date? [10]

Mrs. Barnes: What is the date of the contract for the runway that will head towards us?

Mr. Weymann: I haven't any idea, but there is a flight course for aircraft directly over the property.

Mrs. Barnes: Only because it was put there in bad faith, your Honor.

The Court: Never mind this matter of bad faith. That has to be proved.

Mrs. Barnes: I can prove it.

The Court: Your statement or Mr. Weymann's statement as to good faith wouldn't mean anything.

Mrs. Barnes: I see.

The Court: We are here to prove statements.

Mrs. Barnes: I will, sir.

Mr. McKendry: Your Honor, there is a civilian housing project within possibly a mile or a mile and a half——

The Court: Are you an attorney?

Mrs. Barnes: He is a pro per.

The Court: What is your name?

Mr. McKendry: McKendry, M-c-K-e-n-d-r-y.

The Court: Do you desire to say something?

Mr. McKendry: Yes.

The Court: You may.

Mr. McKendry: There is a housing project there at the Air Base, a civilian housing project, with probably four to [11] five thousand people living there, which is far closer to the flight line at the Air Base than our own property is.

Mrs. Barnes: Including schools.

The Court: Mr. Weymann, the Court will have your witness sworn for the purpose of determining the necessity of hearing this today instead of letting it be continued. If it is continued it has to be continued until after the middle of October.

Mrs. Barnes: May I say something? On the 21st, in bringing in the motion to dismiss and set aside the declaration of taking and set aside the *ex parte* judgment, at that time I am asking the government to produce——

The Court: That isn't before the Court.

Mrs. Barnes: No, but——

The Court: Just don't mention it. I want to hear this witness.

Mrs. Barnes: All right, your Honor.

The Court: Have the witness sworn.

MARION J. AKERS

a witness called on behalf of the Plaintiff, having been first sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Colonel Marion J. Akers.

The Clerk: How do you spell your last name?

The Witness: A-k-e-r-s.

The Clerk: Have that seat, Col. Akers, please.

The Court: Mr. Weymann, remember that this witness is being called for a particular purpose, to show whether or not it will be convenient to continue the matter, or whether it should be heard today.

Mr. Weymann: That is correct, your Honor.

Direct Examination

Q. (By Mr. Weymann): Col. Akers, what is your function in connection with the Flight Test Center at Edwards Air Force Base?

A. My function is Chief of Staff assigned to the Air Force Flight Test Center.

Q. And in connection with that, you have general supervision of the administrative branch of the Test Center?

A. It is a little more than that.

Q. Explain to the Court.

A. The position of Chief of Staff is more or less as the title implies. A Chief of Staff is responsible for the supervision and instruction, directions to the various staff members of the organization. The

(Testimony of Marion J. Akers.)

Chief of Staff in turn answers directly to the Commander.

The Court: Will you talk a little louder, please, Colonel.

Read that answer, Mrs. Buck. [13]

(The last answer was read by the reporter.)

Q. (By Mr. Weymann): What is the nature of the work carried on at the Flight Test Center?

A. The assigned mission or missions is to conduct tests of new aircraft, flight tests of new aircraft, the research and development of various components, engines, and so on, in relation to the testing of new aircraft, and the support of research and development effort of other governmental agencies, contractors and so on, in the research and development field.

And have you had prepared under your supervision certain sketches and maps showing the location of this property within the area of the Edwards Air Base?

A. I have (producing documents).

The Court: Just put them on the table. Let Miss Barnes stand there and look at them.

Q. (By Mr. Weymann): Will you state what those sketches are, please?

A. This one here on top is an outline of the area——

Q. Pardon me. "This one here on top" refers to——

A. Enclosure No. 1.

Q. ——Enclosure No. 1.

A. That is an outline of the area for the Flight

(Testimony of Marion J. Akers.)

Test Center. It shows the large runway, the master test runway [14] presently under construction at this point (indicating), and shows the extension line and flight line area for the runway. It shows the two-mile clear zone, a mile either side of the center of this runway, which is specifically designed for safety purposes, this area here (indicating).

The yellow material indicates the property in question.

The Court: That is the property of these defendants here?

The Witness: That is right.

Mrs. Barnes: One minute. May I say something now, your Honor?

The Court: Just wait.

Mrs. Barnes: Okay.

The Court: You may ask a question if you desire.

Mrs. Barnes: All right. Col. Akers, the Air Base now has a contract there let to build a runway, is that correct?

The Court: That is cross examination.

Mrs. Barnes: No,——

The Court: Wait until Mr. Weymann finishes his direct examination.

Mrs. Barnes: I just want to get——

The Court: Don't ask any further questions.

Go ahead, Mr. Weymann.

Mr. Weymann: I would like to offer this in evidence.

The Court: Well, it is not a question of it being in evidence. [15]

(Testimony of Marion J. Akers.)

Mr. Weymann: Very well.

The Court: It is for the benefit of the Court.

Mr. McKendry: Your Honor, may I ask one question on that?

The Court: Now, which one of you is going to conduct the cross examination?

Mrs. Barnes: I will, probably.

The Court: Just one of you can cross examine.

Mrs. Barnes: What do you want to ask?

Mr. McKendry: I was going to ask, this doesn't appear to be the proper shape of our property.

The Court: You can ask that on cross examination, or Miss Barnes can.

Q. (By Mr. Weymann): Now, with reference to Enclosure No. 2, what does that purport to show?

A. Enclosure No. 2 — may I borrow a pencil, please — again shows the new runway, the master test runway, in this location coming out here (indicating), with a flight path. It shows the existing runway presently in use, which is this runway coming out in this direction (indicating).

The Court: That is the upper red mark?

The Witness: That is the flight zone. This (indicating) is the runway itself, which ends here and here (indicating). The airplanes taking off to the southwest fly in this general [16] area on take-off, auxiliary to climbing speed and so on. Approaching for landing the other way, they come in in this direction (indicating).

The Court: What is the other?

The Witness: This runway on the south end of

(Testimony of Marion J. Akers.)

the lake is a runway on the lake bed, which is used for test purposes, and its extension and the flight zone also comes out across here (indicating). The dumbbell-shaped pattern shown on this map is a flight pattern for the all-altitude speed course.

This all-altitude speed course is used in connection with the test work being done.

The Court: What is being done there now?

The Witness: In what respect, sir?

The Court: At that location, in connection with the property you want to take. I want to know now whether the Court can reasonably continue this for a month or so, or whether it has to be heard at once.

The Witness: The object of these maps, your Honor, is to show the flight path area with respect to this property in question. We are flying not only ordinary types of aircraft, but new and experimental types of aircraft. In order to make their approach to this runway presently in use and to this runway (indicating) presently in use, and take off from the runway, it brings them near the property in question.

The reason we do testing is to determine the faults, the [17] things wrong with new airplanes and the new equipment,—determine what is wrong, and fix it. We don't like to expect accidents or mishaps, but they sometimes happen.

Q. (By Mr. Weymann): Now, with reference to the dumbbell-shaped heavy lines, do I understand that that is the speed course which is now being used for experimental craft?

(Testimony of Marion J. Akers.)

A. That is the flight path, generally the flight path, flown by the aircraft using the all-altitude speed course. It is presently in use, and will be for some time, and will continue to be used in conjunction with test work.

Q. Will you tell the Court some of the hazards involved in the use of that property, in that connection?

A. To explain what this means,—

The Court: You are now referring to what?

Mr. Weymann: To Enclosure No. 3.

The Witness: Enclosure No. 3 shows the outline here of Rogers Dry Lake. This is Rosamond Dry Lake here (indicating).

Rogers Dry Lake has a surface which is very excellent material for the landing of aircraft. When it is dry, aircraft of most any size can be landed on the lake bed without damage. Because of that, it is very widely used in conjunction with the test work.

The green dots shown here are plots of the nine accidents that have happened in this area in conjunction with test work. [18] Now, the pink dots we see over here (indicating) are these same nine dots or the crash pattern, if you so please, transposed into this location here (indicating).

The 15,000-foot runway which is the present runway under construction will permit test work to be conducted during the rainy season, which heretofore has not been able to be run because the lake bed was wet and the existing runway was not of sufficient length or of the quality required for the work.

The Court: When is the rainy season?

(Testimony of Marion J. Akers.)

The Witness: The rainy season is generally during the winter months.

That is, all this shows is the crash pattern transposed there, which indicates merely that crashes do happen in conjunction with the test work; and where they are going to happen is unpredictable.

The Court: The pink dots don't actually represent crashes?

The Witness: That is correct.

The Court: It is just a transposition that has been made?

The Witness: A transposition of this pattern over there, since this (indicating) will be the active test runway.

The Court: Now, that situation that is there now, how long has that prevailed? In other words, you are asking for immediate possession now of what appears to be a comparatively [19] small tract of property. How many acres are there in the property, in that yellow?

Mr. Weymann: 360, I believe.

The Court: How many?

Mr. Weymann: 360.

The Court: 360. I am trying to get the picture of what the situation is now, and what it will be, say, a month from now.

The Witness: The hazard, your Honor, exists daily, of course, in flying. In the acquisition of the property to complete the expansion program for the test center, the boundary described here on En-

(Testimony of Marion J. Akers.)

closure No. 1 shows the eventual boundary of the reservation.

This (indicating) shows the location of the property in question, more or less of an island, isolated, not exactly in the center but in the central portion.

Mr. McKendry: Your Honor, may I——

The Court: Wait until this witness finishes, if there is any cross examination.

Q. (By Mr. Weymann): Have you finished your answer, Colonel?

A. I trust I have answered the question.

Mr. Weymann: I may say that the order for immediate possession contemplates the granting to the defendants of a reasonable time in which to remove from the premises, 30 or [20] at most 60 days; but, in order to carry on that work and for security reasons, we think the order *would* be granted at this time giving the defendants a reasonable time, under the circumstances, to remove their property from the location.

The Court: Have you made your showing? Have you finished your showing?

Mr. Weymann: No, I haven't finished yet.

Q. Now, are there any other reasons, Colonel, that you have? Have any private airplanes been flying there?

A. The property in question, your Honor, includes also an air field lying in this locality (indicating), and the possibility of mid-air collision or dangers involved I think are quite obvious when you can see from Enclosure 2 the existing runway.

(Testimony of Marion J. Akers.)

The present runway being used carries the aircraft on take-off in this direction (indicating), and on landing in this way (indicating), close to the property in question.

The Court: Where would the property in question be?

The Witness: This yellow property shown here again.

The aircraft flown by the Test Center, many of them are high-speed aircraft. They cover quite a distance in a relatively short period of time.

The aircraft operating out of this field here (indicating) generally are of a slower speed, and are lighter, smaller aircraft. There is a danger involved there. [21]

Q. (By Mr. Weymann): A danger of what, collision, or——

A. Danger of such mid-air collision, yes.

The Court: Well, now, Colonel, let me ask you a question: This property of the defendants has been in their possession for a number of years, I am sure. That is the fact, is it not?

The Witness: I do not know.

The Court: Do you know, Mr. Weymann?

Mr. Weymann: Well, I presume so.

The Court: You are asking now for an order for immediate possession. There have been certain motions made here which the Court should consider.

Now, let me ask you, in your opinion, if there would be any great possibility of damage if the

(Testimony of Marion J. Akers.)

Court were to continue this matter, say, until the latter part of October.

You have—Well, you just answer the question. I want your unbiased opinion.

The Witness: Your Honor, the hazard, the danger, exists today, exists now and has existed. A continuation of 30 days, 60 days, 90 days, merely continues it that much longer.

It is much the same, if you want to compare it for instance, to—Can we cite the airport, say, at Elizabeth, New Jersey?

The Court: Newark. [22]

The Witness: The population was built up around the airport, and consequently, as a result of crashes, the use of the airport was severely limited.

I hope no accidents happen,—I sincerely hope so—however, we can not say definitely they will not.

The Court: Well, will they be prevented if you are given this order of immediate possession?

The Witness: The accidents, your Honor, may not be prevented. However, the property belonging to someone else may not be damaged. If the property belongs to the government,—

The Court: It belongs to the government now; is that correct?

Mr. Weymann: That is correct.

The Witness: The government can not be sued for damages if there is no one living there. That possibility of loss of life as a result of a crash is eliminated.

The Court: We are not talking about a suit

(Testimony of Marion J. Akers.)

against the government. I am talking about the loss of life that might result or might not result if it is continued.

Now, Mr. Weymann has proposed that the named defendants who own these 360 acres of land should be given 30 to 60 days in which to remove their property. That means that the situation at present would remain in status quo.

There have been these motions made. I don't know anything [23] about the worth of the motions. I have not examined them. They have just been presented today. Mr. Weymann has had no chance to examine these papers.

I want to give everybody a chance in this matter. I do not want to take chances on the loss of life. So I am trying to determine if the Court can reasonably continue this matter until all those can be heard.

Mr. Weymann: There is, of course, the further reason, and that is for reasons of security. These are classified operations that are carried on in there, and in order to protect the security of those operations the government should have possession of the property as soon as reasonably possible, in order to prevent any leakage from these premises.

There is here a motel, for example, on these premises, and people come in and go out there, and that is a thing we seek to put an end to.

The Court: Well, has that condition existed all the time?

Mr. Weymann: That is correct; but there is no

(Testimony of Marion J. Akers.)

reason why it should continue any longer than is necessary.

The Court: Well, there has a motion been made here,—

Mr. Weymann: That is correct.

The Court: —and the Court should consider that.

Mr. Weymann: That is correct, your Honor. Pardon me, as to these other motions, I haven't seen them at all. [24]

The Court: No. You don't know what they are?

Mr. Weymann: I don't know what they are, except I looked them over in the Clerk's office this morning.

The Court: Miss Barnes, do you desire to ask any questions?

Mrs. Barnes: There is a whole lot of cross-examination of the Colonel, your Honor.

In the first place, this map is very deceptive. They defeat themselves by running all the patterns together. If my place is going to be a hazard and all their flights are going to conflict, how can they run all their patterns across each other?

Mr. Weymann: May I interpose a suggestion?

Mrs. Barnes: The Judge didn't let me interrupt you.

Mr. Weymann: If Miss Barnes is going to cross-examine, I suggest she confine herself to cross-examination. If she is going to give testimony, I would like to have her sworn.

The Court: If you want to cross-examine the

(Testimony of Marion J. Akers.)

Colonel so you can bring out that feature, you may do so by questions.

Mrs. Barnes: Okay.

Cross Examination

Q. (By Mrs. Barnes): In the first place, Colonel, is this yellow spot made in proportion to the size of the acreage to the rest of it? In other words, is this to scale? [25]

A. No, it is not to scale exactly. The map itself is not exactly to scale; it is only approximate.

Q. In other words, you would say the yellow spot, in regard to the rest of it, is made a very big spot, whereas in comparison with the rest of the property it would probably appear the size of a pin point; is that correct? A. No.

Q. Tell me what the difference would be.

A. As I stated before, it is only an approximation to show the general location. There was no attempt made to show it exactly to scale.

The Court: It is larger than it should be?

The Witness: It may be, I don't know.

Q. (By Mrs. Barnes): In fact it is very much larger.

Point out on this particular map where the housing project is where all the 5,000 families are living.

A. I don't know where 5,000 families are living on the reservation.

Q. They are right in this area. Why don't you put them off?

(Testimony of Marion J. Akers.)

A. We do not have 5,000 families. I believe you are——

Q. The housing area, the warehouse, the——

A. They are not 5,000 people.

Q. How many people are there? [26]

The Court: Where is the housing area?

The Witness: The housing area is in this area (indicating).

The Court: About how many miles away from the property in question?

The Witness: I would have to estimate. I would estimate it to be four to five miles.

The Court: North of the property in question?

The Witness: Approximately north, yes, sir.

Q. (By Mrs. Barnes): Which is the existing runway you are using right now?—Wait a minute. You intimate here that this is all government property, and you have got it marked on your map as government property. Is that all government property and deeded to the government except my place?

A. No. As stated previously, this map merely shows the eventual boundaries of the reservation.

Q. In other words, there is a great deal of privately owned property, besides the property we are defending, in this same area, is that correct?

A. There could be.

Q. In fact there is. Do you know that?

A. I don't know.

Q. How do you know so much to testify to this, if you don't know these other things? [27]

(Testimony of Marion J. Akers.)

The Court: You don't need to answer that.

Mrs. Barnes: Okay. Anything else on this?

The Court: Identify that. What is that you have referred to?

Mr. Weymann: Enclosure No. 1.

The Court: Have you any other questions on Enclosure No. 1?

Take the next one then.

Q. (By Mrs. Barnes): This again is a map of the proposed plan, is that correct, Colonel Akers?

A. It is a map indicating the proposed eventual military reservation area.

Q. Is this all owned by the United States excepting the yellow spot which indicates ours?

A. I do not believe it is.

Q. In fact, there is other property in the same vicinity that isn't owned by the government; is that correct?

A. I do not know.

The Court: Is it in the runway portion, the other property?

The Witness: Which other property, your Honor?

The Court: Owned by other persons.

The Witness: Yes, sir, there is other property in the runway area. Whether or not all the other property has been [28] acquired or not is the thing I do not know.

Mr. Weymann: It is under condemnation.

The Court: Yes, but so is Miss Barnes'.

Mr. Weymann: Yes. It hasn't all been acquired, though.

(Testimony of Marion J. Akers.)

The Witness: I might clarify one point for the Court.

The Court: If it is on that point, you may do so.

The Witness: Yes, it deals with the acquisition of property.

The Court: No, but does it refer to the other property in that vicinity?

The Witness: Yes, sir, it does.

The Court: Then you may.

The Witness: In fact, the Corps of Engineers acquire the property for the Air Force, then turn it over to us. We do not at the Base go out and acquire the property ourselves. That is the reason I do not know the exact situation in that regard.

Q. (By Mrs. Barnes): Another thing I want to mention. You mentioned the speed course. What is the average elevation flown on that speed course?

A. The average elevation can be any elevation. It is an all-altitude speed course, and is used for test purposes, measuring air speed at any elevation.

Q. What altitude has been used? [29]

A. I couldn't quote specific altitudes, because I am not familiar with it.

Q. It is called "high altitude speed course" do I understand you to say?

A. No, it is an all-altitude speed course.

Q. However, it is used usually at very high altitudes, is that right?

A. I couldn't answer that question specifically. It is used for all altitudes.

(Testimony of Marion J. Akers.)

The Court: That answers the question.

Mr. McKendry: Why does the hazard exist over our area and not over this other area?

Mrs. Barnes: I will word that again.

Q. Why does the hazard exist over our area only, when the same planes go right over the City of Rosamond, which is right down the line?

The Court: How far is that in miles?

Mrs. Barnes: They have drawn——

The Court: No, just answer the question.

Mrs. Barnes: Approximately 12 miles.

The Court: Don't answer that question. It is not material.

Mr. Barnes: Your Honor,——

The Court: What is your name?

Mr. Barnes: William Emmert Barnes. [30]

The question is material. The course drawn on the map goes right over the town of Rosamond. If the existing use of it would be a hazard to our property, it would also be a hazard to the millions——pardon me——hundreds of homes in Rosamond.

The Court: You don't need to answer that question.

Mrs. Barnes: We are trying to decide now——

The Court: Don't ask that question.

Q. (By Mrs. Barnes): Colonel Akers, how long, in your knowledge, has this condition that exists now existed,—how many years? You have had access to the history of the base.

The Court: Just let him answer.

(Testimony of Marion J. Akers.)

Q. (By Mrs. Barnes): How many years has it existed as it exists now?

A. What condition are you referring to?

Q. The operation of the Air Base as a test base, and the defendants' property?

The Witness: I believe, your Honor, that is a question that can not be answered directly.

The Court: Just try to answer it, if you can.

The Witness: The condition, as I understand the question, is one that varies and changes.

The Court: The present condition, how long has it existed? [31]

The Witness: The present condition,—I would like to clarify my statement on that.

Mrs. Barnes: Just let me clarify my question.

The Court: No, no, let him answer.

The Witness: The fact that the present runway, as shown here on Enclosure 2 as I pointed out here, the lake bed runway, the dry lake, the operation of test flights in this location with respect to the property in question, to my knowledge, has existed in one degree or another since I believe it was in 1948 or '49, when they started to conduct test work from here.

However, the tempo of the test activity has increased gradually each year; and that is the point I would like to make clear to the Court, that the activity is constantly increasing.

The Court: Well, I think the Court has heard enough examination and cross-examination.

Mr. Weymann: Very well, your Honor.

Mrs. Barnes: Your Honor,—

The Court: I don't care about hearing anything further.

Mr. Weymann: You may step down, Colonel.

(Witness excused.) * * * * * [32]

Tuesday, October 27, 1953. 10:00 A.M.

* * * * * [39]

GLENN L. ARBOGAST

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your full name.

The Witness: Glenn L. Arbogast, A-r-b-o-g-a-s-t.

Mr. Weymann: At this moment, please, may the record show that the plaintiff objects to any testimony on the part of any of these witnesses called by the defendant, on the ground that the testimony is incompetent and irrelevant to any of the issues in this matter.

The Court: Well, your objection is overruled. The Court has permitted this matter to be brought out of order for the convenience of the witnesses.

Just be seated. Will you give your name, please?

The Witness: Arbogast.

The Court: Proceed. [54]

Direct Examination

Q. (By Miss Barnes): What is your business at this time, Colonel?

A. I am Director of Aeronautics for the City of Long Beach.

(Testimony of Glenn L. Arbogast.)

Q. You have under your care the Municipal Airport of Long Beach? A. I do.

Q. Will you please more or less state the size of that airport in comparison to other airports, for instance, in southern California; how does it rank?

A. That is the second largest airport in southern California.

Q. And the first largest is which one?

A. Los Angeles International.

Q. Do you have factories building aircraft on that Municipal Airport?

A. Yes, we do have Douglas Aircraft.

Q. Douglas Aircraft build airplanes there?

A. That is right.

Q. Do they build jet airplanes?

A. They are not building any jet airplanes at this time, but they are in the way of building jet bombers.

Q. Do jet aircraft land or take off at your airport? A. Yes. [55]

Q. Tell me, Colonel, were you ever commanding officer of the Muroc Air Base? A. I was.

Q. I believe that is now called Edwards Air Flight Test Center. A. Yes.

Q. What years were you commanding officer?

A. September, 1940 to December, 1942.

Q. You were commanding that base at the time war broke out, that is, the second world war?

A. That is right.

Q. What was the function of that base previous to the war? What was the activity?

(Testimony of Glenn L. Arbogast.)

A. A gunnery range.

Q. Did they do any testing at all there?

A. Towards the last they did. They started in in August of 1942.

Q. Previous to the war, did they test radio controlled ships, and so forth? A. They did.

Q. In other words, during your command——

A. Yes, they did, in 1941; I am sorry.

Q. ——it was an aircraft test Base?

A. That is right.

Miss Barnes: I want to establish that because, in court [56] here——

The Court: You don't need to explain to the Court why.

Q. (By Miss Barnes): It was a test base, then, as early as 1940 or 1941? A. 1941.

Q. When was the first test jet airplane flown from Muroc?

A. I believe it was in August, 1942.

Q. Colonel Arbogast, how long have you known this defendant? A. Twenty-five years.

Q. Have you known the defendant's relations with the Air Force and been around where she has been around the Air Force?

A. Please re-state your question.

Q. Well, how did I get along, or how did I get along with the Air Force over the period of years? Did you have any trouble with me yourself, as commanding officer at the Air Base?

A. No, I did not; and you furnished milk to us for years.

(Testimony of Glenn L. Arbogast.)

Mr. Weymann: Just a moment. The witness will please confine himself to answering the questions, although I don't see the materiality of any of it.

The Court: Just do that.

Proceed. [57]

Q. (By Miss Barnes): During that time, was Pancho Barnes a good friend of the Air Force, and did she come around the Base and be nice to people, and the Air Force go to her?

A. Yes.

Q. Now, because of the result of an accident near Elizabeth, New Jersey, I believe, or Newark, there was a commission by Jimmy Doolittle, there was a research of that particular accident, and I believe there were findings in that as to the proper space for the end of the runway, that there should be buildings—What does that say, do you remember by any chance?

A. If I remember right, I think there was a half mile clearance on the end of the runway.

Q. Any further provisions?

A. A height limit, one to 40 or one to 50, whichever it happened to be, on instrument runway or non-instrument.

Q. Was there any other provision at all for the next two miles?

A. That would take in the height limit on it.

Q. Do you remember the specifications of the buildings? You stated for the first half mile it would be clear, no buildings, then the next two

(Testimony of Glenn L. Arbogast.)

miles there was a certain restriction. Do you remember the type of building that such should be in that next two-mile area? [58]

A. No, I do not.

Q. Colonel Arbogast, what rank were you at Muroc when you first took the command?

A. Captain.

Q. And what rank at the end of 1942 had you attained? A. Lieutenant Colonel.

Q. After you left,—that was 1942 you left, was it? A. Yes.

Q. After you left there, did you ever return to work on that Base?

A. Yes, I returned in January of 1946.

Q. And what was your capacity at that time?

A. Deputy Base Commander.

Q. Were the defendants, myself and the two other defendants—not the two other defendants; my son and myself—were we there at that time?

A. Yes.

Q. Were our relations friendly at that time?

A. Yes.

The Court: You have gone into that.

Oh, Miss Barnes, let this gentleman approach you, instead of you having to go around there.

Miss Barnes: He is another proper, your Honor.

Q. How much activity do you have on the airport which you are now in charge of? [59]

A. Around 20,000 landings and take-offs a month.

(Testimony of Glenn L. Arbogast.)

Q. What is the maximum that you have had there in a month? A. 56,000.

Q. In one month? A. In one month.

Q. As the director of the Municipal Airport, what types of flying do you have off of that field?

A. We have student training and private flying, scheduled and non-scheduled airplanes, military flying, and factory testing.

Q. Do you know the defendants' airport at Muroc? A. Yes.

Q. All of the various kinds of flying that you have at Long Beach, do they seem to get along together, I mean the little private ships, the fast jet ships and the air lines? A. Yes.

Q. Do you consider that the defendants' airport is a good airport and well situated?

A. Yes, for the type it is, commercial.

Miss Barnes: Your witness, Mr. Weymann.

Mr. Weymann: I have no questions, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Weymann: Now I move to strike the witness' testimony [60] as having no bearing whatever on the good faith of the Secretary or the Assistant Secretary of the Air Force in making his determination of the necessity for the aquisition of the subject property.

The Court: What have you to say about it, Miss Barnes?

Miss Barnes: Will you read what Mr. Weymann said.

(Record referred to read by the reporter.)

Miss Barnes: We think the Secretary of the Air Force got his advice from the subordinates at Muroc, and that the only way that he could know the situation would be through his subordinates.

Also, the witness answered some of the allegations that Mr. Weymann has made in this thick file of papers, in which he opposed our various motions, in which he has stated that the defendant Barnes, Pancho Barnes, had a long history of not getting along with the Air Force, and that there were continuous fights between them; and I think the witness' testimony shows Pancho Barnes did get along with the Air Force and had cooperated with the Air Force.

Also, on September 9th, when Colonel Akers was testifying, Colonel Akers himself brought in the Elizabeth, New Jersey accident and related it to the defendants' property. Consequently, Colonel Arbogast, a director of a very large airport, knew about the ruling made by the committee; and I have tied that in with the earlier testimony on the hearing. [61]

The Court: The Court will take the motion under advisement and rule upon it later.

Call your next witness.

Miss Barnes: Colonel Smith.

A. W. SMITH

called as a witness on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name is Colonel A. W. Smith?

The Witness: A. W. Smith.

The Clerk: Have that seat.

Mr. Weymann: May the record show the same objection to all of these witnesses?

The Court: Same ruling of the Court.

Proceed.

The Witness: Your Honor, I would like to ask a question. I am an officer of the regular army, retired; and I would like to know if there are any restrictions on my testifying here.

The Court: Well, I don't know of any. That is a matter I don't know about.

The Witness: I referred to what we get in the way of restrictions (producing document).

The Court: Have you shown that to Miss Barnes?

The Witness: No, I haven't.

The Court: Show it to Miss Barnes and Mr. Weymann. * * * * * [62]

DON SHALITA

called as a witness on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Don Shalita.

The Clerk: That is S-h-a-l-i-t-a?

The Witness: Yes. [67]

Miss Barnes: Should he state his name again?

The Court: I think it is in the record.

Direct Examination

Q. (By Miss Barnes): What is your address, Mr. Shalita?

A. 1773 Bedford Street, Los Angeles 35.

Q. Do you recall where you were in about January, 1945?

A. Yes.

Q. Where?

A. At the ranch.

Q. You mean the defendants' ranch?

A. Yes.

Q. Do you recall—

The Court: That is the property involved in this action?

The Witness: Yes, it is.

Q. (By Miss Barnes): Do you recall visiting the office of the Commanding Officer of the Air Base, Colonel Maxwell, during that time?

A. Yes, I do.

Q. Do you remember a conversation—or were you present and do you remember a conversation that took place between Pancho Barnes and Colonel Maxwell?

A. Yes.

(Testimony of Don Shalita.)

Q. In reference to the opening of the airport?

A. The airport, yes. [68]

Q. Do you remember any statements that Colonel Maxwell—any definite statements regarding the opening of her airport that he made at that time?

A. Well, he closed it, and he refused to see us.

Q. No, I am talking about a conversation wherein—

The Court: When was this, Miss Barnes?

Miss Barnes: In 1945.

The Court: In 1945. Can you place a date any nearer than that?

Miss Barnes: Well, in January, 1945.

The Court: In January, 1945?

Miss Barnes: Yes.

Q. In the files of the government, in the motion to dismiss, I have fairly well detailed that conversation, and, as you were present at it, I would like to know if that was the statement approximately that took place at that time:

On entering Colonel Maxwell's office, Pancho said, "Hello, Buddy."

Colonel Maxwell said, "Hello, Pancho. I suppose you are going to ask me to open your airport, and the answer is 'No.'"

"Pancho: Why?

"Colonel Maxwell: Oh, there might be an accident some day.

"Pancho: If we went on that theory, there wouldn't be an airport open in the United States.

(Testimony of Don Shalita.)

“Colonel Maxwell: Well, you might as well know that your airport will never be open again.

“Pancho: Sez who?

“Colonel Maxwell: I say so. It will never be open again.”

Do you recall a conversation like that, Mr. Shalita? A. Yes, I do.

Q. Is that the true conversation, and can you add anything to it?

A. No, that is exactly the way it was said.

Q. What relation did you have to the defendant at that time, Mr. Shalita?

A. Well, I was your husband. * * * * * [70]

Tuesday, October 27, 1953. 2:00 P.M.

The Court: You may proceed.

Miss Barnes: Your Honor, I would like to take the stand myself.

The Court: You want to take the stand?

Miss Barnes: Yes, I want to take the stand.

The Court: Will this be the only occasion on which you will take the stand?

Miss Barnes: It is hard to say, your Honor. I really don't know.

The Court: The Court would like to know. I want to save as much time as possible.

Miss Barnes: I think so, your Honor.

I will stipulate this is the only time I will take the stand, if I can continue it through. I will make a chronological explanation.

The Court: You may do so.

PANCHO BARNES

a witness on behalf of the defendants herein, having been first duly sworn, testified in narrative form as follows:

Direct Examination

The Clerk: State your name for the record.

The Witness: My name is Pancho Barnes.

I came to Muroc first in about 1928, and flew off of [72] the dry lake at Muroc. I was working at the time as a test pilot and flew airplanes for Lockheed and other factories; and I always liked that location very much, and appreciated the desert for its many good qualities.

In 1933, I went out on the present ranch in the desert, which I bought there at that time, and began living there, and have been there ever since.

When I bought that ranch, I picked it especially in view to flying aircraft and putting in a flying field. It is situated almost equal distance between Rosamond dry lake and Muroc dry lake, and there is a small circle of dry lakes that extend to the south of it practically joining those two lakes.

When I first went to the desert, I started alfalfa farming, and later had a dairy; and when I was in the dairy business I started selling milk, in about 1934 or '5, to the Muroc bombing and gunnery range, which was situated on the east side of Muroc dry lake.

I stayed there doing that sort of work through several years, and we had our little air strip and airplanes that we got in there during that time. And when the World War came on, or just before

(Testimony of Pancho Barnes.)

it came along, the government contacted me and asked me to put in a flight training program under the C.P.T. With the help of the C.A.A. and the Civilian Pilot Training Program, that airport was established, and it was designated there as an airport, and approved by the [73] C.A.A. and the Civilian Pilot Training Program, and a very beautiful airfield, according to specifications, was built.

The hangar was especially constructed for student training. There were rooms in there, eight bedrooms, a bathroom, pilot ready room, class room, shop, lounge, and two offices, and it was a very nice field.

The runway is about 3700 feet long and 400 feet wide, the main runway; then there are two other full runways, running north-south and east-west.

So we trained students there previous to the war and up until December the 7th, when the government closed down all airports within 150 miles of the ocean.

The Court: What year was that?

The Witness: In December, 1941, they closed the airport, as they did all of the airports on the Pacific Ocean within 150 miles of the ocean.

After they closed the airport down, I was unable to take the pilot training away from there, because I had become very much involved, with my son, with the milk contract at the Air Base. We had developed a contract, and which we held for 12 years, selling milk at the Air Base; and because of

(Testimony of Pancho Barnes.)

the terrific demands of the Air Base, which was growing so fast,—they got up to many thousands of people; I believe they had as much as 15,000 people on that Base. They came and went.

The Court: You say you have that many now?

The Witness: No, that was back. The Air Base is comparatively small now, your Honor. At that time the Air Base was very big, and besides flight training, which the Base was mostly devoted to at that time, they had anti-aircraft wandering around the desert which were all based at that Base.

During the time of the war, the Air Force took possession of the airport and named it a satellite field to the Air Base. I was very much in accord with that,—I didn't object to it—but they did take possession by merely breaking in the hangar, which was one of those things, it really didn't matter, and they used it as a training base for anti-aircraft, in that the anti-aircraft defended the Air Base from attack. The P-38's and B-24's from Muroc Air Base and the F4U's from the Marine Base at Mojave would rendezvous there and attempt to "take" the airport—put that in quotes—and the anti-aircraft would fight them off. It was very exciting, like being in the middle of the war. We enjoyed it. It had its hazard, of course, but it was of great interest to all of us.

They continued using the airport for training purposes throughout the war.

In 1945, I had returned from Philadelphia and wanted to re-open my airport. Previously I had

(Testimony of Pancho Barnes.)

made several attempts to re-open my airport. About that time other airports had re-opened, possibly a year or so in advance of that. At one time I thought it was going to be opened, then for some [75] mysterious reason it was kept closed.

In 1945 I went to Colonel Maxwell, who was the Commanding Officer at the Air Base, and asked him to open the field. Before I had a chance to ask him, he said, "I suppose you are going to ask me to re-open your airport. The answer is 'no.'"

The Court: That was in 1945?

The Witness: 1945. He made the statement to me then that the airport would never be opened again. He made it three times. He said I might as well give up the idea; that the Air Corps was going to keep that airport closed.

I told him I believed it was his privilege, as Commanding Officer of the Air Base, to open the field, give his sanction to it. He said, no, he couldn't do that.

I said for him to think it over.

I did nothing at the moment. I think it was as late as the fall of the year, about October, I went before the Interdepartmental State Traffic Control Board, which consisted of the C.A.A., the Navy and the Army,—the three bodies voted on airports—and asked them to review the case and open the airport. It was put to a vote at that time, and it was voted that the airport should be opened, and it was opened then, and has been running ever since.

(Testimony of Pancho Barnes.)

In 1946 the Master Plans were drawn for a great many bases throughout the country, and at that time the Master Plan was drawn for the Muroc Air Base. It was evidently a [76] very well-drawn plan, and quite different, I believe than their present plans are now. Colonel Kluever worked on that plan and was largely responsible——

The Court: How do you spell it?

The Witness: K-l-u-e-v-e-r; Colonel A. F. A. Kluever. He drew the Master Plan, and he was praised very much for his actions in the drawing of that plan. I have a letter here commending him on the fine work he did in drawing that plan at that time, which I would like to read to your Honor.

The Court: Is it important to read that?

The Witness: Well, your Honor, I think the whole case hinges on this.

The Court: Read it, then.

The Witness: This is dated 15 August, 1946.

“Subject: Letter of commendation.

“To: Lieut. Colonel A. F. A. Kluever, A. C.”
And then it gives his numbers here. Should I give them, too, all of them?

The Court: Never mind. Just read the letter.

The Witness: (Reading.)

“It is with pleasure that I extend to you my commendation for the excellent work you performed while assisting in the preparation of the folder of A.A.F. basic information for Master Planning of Muroc Army Air Field during the period 1 July—13 August, 1946. [77]

(Testimony of Pancho Barnes.)

"The many extra hours that you put in during evenings and on weekends denotes a high regard for duty and loyalty to this Command and the Army Air Forces.

"A copy of this letter will be placed in your 201 file."

It is signed, "S. A. Gilkey, Colonel, Air Corps, Commanding."

Colonel Kluever told me that he submitted the plans back to Wright Field, where they were approved—I believe he said ten copies of the plan—where they were approved. And at one time, just before Colonel Gilkey came in, incidentally, Colonel Kluever was in command some three months of the Muroc Air Base.

In August, 1947, my horse barn burned down. It was a considerable loss, as it was at the time the finest building on the place. Besides just being a horse barn, it contained rooms and offices, and a large loft, and storage for hay and grain, and it had my best stallions in it. It was really a stallion barn. It had my tack room and all my tack—that means saddles, bridles and harnesses—and one part of the barn also took care of the racing sulkies for the trotting horses we had at that time.

This barn burned down, so subsequent to that an enlisted man from the Air Base came and told me that I really owed him a great deal, because he had attempted to save the barn and had succeeded in getting two of the horses out, also wak-

(Testimony of Pancho Barnes.)

ing [78] up the man that was sleeping there, lodged there, to take care of the horses. He said he thought I should give him a horse, that he burned his hand.

I looked at his hand. It didn't appear to be burned very much. He went on to say, "I know who started the fire." I didn't believe him, didn't pay much attention, because I felt, having asked me to give him a horse, he was trying to make a statement; so when he told me he knew who started the fire, I didn't pay much attention.

About a week later, the N.C.O. Club of the Air Force was burned down, and this same man, who was guarding, was killed in the fire. He wasn't where the fire was actually burning; he was unconscious and was smothered.

I worried about it then, he having told me who started the fire, and we started watching and checking, and our suspect in this arson matter was——

Mr. Weymann: I object. Are you mentioning any names?

The Witness: I can.

Mr. Weymann: We certainly will object to it.

The Witness: I would rather not mention the name, because we are still trying to catch him.

Mr. Weymann: All right.

The Witness: Anyway, we spent a great deal of time on it. The fires went on on the base, and there were some eight incendiary fires that all happened in a row, one after [79] the other. In the meantime, I had been in touch and working with Detec-

(Testimony of Pancho Barnes.)

tive Sergeant Ed Hatcher of the arson detail in Los Angeles County, as they also had arson fires around Lancaster, and so forth, and I asked—Mr. Hatcher went to the Air Base to try to get cooperation from them, as we were pretty sure this man was the man that had lighted all the fires.

The Air Base at that time—Colonel Gilkey and Colonel Rau were in command—refused at first to talk to Mr. Hatcher at all, and when they did talk to him I believe they stated to him——

Mr. Weymann: Just a moment. Were you present at those conversations?

The Witness: No, Mr. Weymann.

Mr. Weymann: Then I object, your Honor; hearsay evidence.

Miss Barnes: I have the witness, Mr. Hatcher, with me in court.

The Court: Don't relate anything of which you are not aware.

The Witness: Now, in the meantime, coming back from the arson proceedings, after the N.C.O. Club burned down, the boys that were running the N.C.O. Club wanted a place to move the club, so they approached me and told me—they didn't ask me—they told me they were going to take my place over.

I told them I wasn't going to let them do that.

They said if I didn't let them take it over, they were going to send two or three hundred soldiers over to break up everything on the place.

(Testimony of Pancho Barnes.)

Mr. Weymann: Pardon me; who are these people?

The Witness: You want me to mention the names of those people who made those statements to me?

Mr. Weymann: Yes.

The Witness: Danny Madison.

Mr. Weymann: Who is Danny Madison?

The Witness: A sergeant, he was at that time. This was in '47. He was the sergeant in command of the N.C.O. Club, I believe.

Mr. Weymann: A non-commissioned officer?

The Witness: Yes.

He made the statement that they were going to take the place away from me by force, if I wouldn't——

The Court: Was he the man that made the statement?

The Witness: That is right,—Danny Madison made the statement. He made that statement, I believe, in front of Mr. McKendry.

I told them, of course, that I wouldn't let them do that.

There was a period there where it looked as if they would try to take the place by force. One weekend—I was just trying to remember the date on it, because I could almost remember that date.

The Court: Read that last statement, Mrs. Buck.

(Record referred to read by the reporter.)

The Court: Proceed, Miss Barnes.

The Witness: On a Saturday, some rooms had been rented in the hotel. We had a great deal of

(Testimony of Pancho Barnes.)

trade at that time from Los Angeles, and one of the sergeants from the Air Base—Mr. Weymann likes names; it was Sergeant Brown—rented a room. He had come over and rented a room with his wife on several occasions, and I didn't think much of that; I mean, it didn't occur to us anything would come of it.

Later that day they carried in a great deal of liquor, ice and mix, in the hotel room.

There were some girls came up from Los Angeles. We didn't realize they even knew them. They were in another part of the hotel, and they all finally got together.

I realized it might get a little rough, and I called up at that time the Sheriff's office in Mojave and told them if anything started there I was going to phone them and ask them to come down right away. Also I phoned the Sheriff's office at Lancaster, which was out of my county, over in Los Angeles County. And they agreed to cooperate and come out, also, in case the trouble arrived.

They had a big barbecue there—that is why I can get the exact date. Their Catholic barbecue was going on at Lancaster, and Loren Fote was helping with the barbecue at that end. [82]

In the meantime, I called Danny Madison and all the Sergeants together and gave them a little talking to, in which I told them if anything started or looked bad I was going to shoot first and ask questions later, and please not start anything and get into trouble.

(Testimony of Pancho Barnes.)

Saturday night went off pretty well.

Sunday afternoon there were a great many enlisted men on the place. The bar was full, and there was quite a hubbub. Gus Pachmyer, one of the greatest gunsmiths in the world, came up from Los Angeles to test high velocity rifles, and had with him two men and their wives. They came into the little bar, I was talking with them, and I had to leave to go to my house and see about my little boy, and I heard a great banging and kicking; in fact, I thought the sergeant was kicking the front of the bar and there might be trouble. I thought there might be trouble, and I picked up a working club in my hand—I was afraid to take my gun, there might be trouble.

It was pretty well under control when I got back. The Provost Marshal was there, that is, Buck Moore. He was in the bar, and he had arrived there with the Provost Marshal—I mean with Von Falk, who was top sergeant of the Provost Marshal's office.

Just previous to my leaving the bar, Von Falk had asked me for ice to carry to the rooms where they had all the liquor. The bartender had already told him he wouldn't give him ice; [83] that is what he was angry about.

When I got back there, I told Sergeant Von Falk to leave immediately. He refused to leave; so I asked Captain Moore, who was Provost Marshal at the Air Base, to please take him. Captain Moore asked him to leave, but he refused to go.

(Testimony of Pancho Barnes.)

I got very angry, because the situation was entirely out of line. I went to the telephone and called Colonel Gilkey at the Air Base. Colonel Gilkey was not at the Base. He was away that weekend, and hadn't returned. I tried to call Colonel Rau. Colonel Rau wasn't there either. I tried to phone the officer of the day. They didn't know who the officer of the day was, and couldn't locate one. They seemed to have no man who was officer of the day, in command.

I happened to know General Tooeey Spatz very well—he was at that time Chief of Staff of the Air Force—and I called him up. It was three or four in the afternoon here, and much later in Washington. He wasn't in his office. I talked to an Aide of his by the name of Cliff Moore, and he asked me to tell him all about what was going on, and I talked to him about 45 minutes. He had a tape recorder taking down everything I said on the telephone, so later, when they sent me a statement taken from my telephone conversation, I found it exactly right in every detail except for the misspelling of Sergeant Von Falk's name.

He asked me at that time—he told me, "Why didn't you [84] call the Provost Marshal?" I told him the Provost Marshal was already at the ranch; that he was unable to do anything about the situation. So he told me I did the right thing in calling him.

I asked him at that time to phone the Air Base and check and see if I wasn't right, that there was

(Testimony of Pancho Barnes.)

no officer of the day or anyone in command at the Base. He said he would send an investigation out on it.

In the meantime, I felt unhappy possibly getting Captain Moore in trouble because I had given his name in Washington. I also felt a little bad about calling Washington without talking to Colonel Gilkey first, because I didn't really want to get anyone in trouble; so the first thing I did then was call Captain Moore and ask to talk to him. He said he would come right over, which he did.

I told Captain Moore I had given his name to the Chief of Staff in Washington, and advised him to immediately put his top sergeant in the Provost Marshal's office under arrest. He said, "I can't let my boys down. I have to stand back of them." I said, "When they are right it is all right to stand back of them, but not when they are wrong."

Anyway, as a result of the investigation, Captain Moore and Sergeant Von Falk were court martialed.

In the meantime, Colonel Gilkey hadn't arrived on the Base, and I at last realized who I should call, which was Colonel [85] Sidney Smith, who actually properly should have been second in command on the Base, because Colonel Rau wasn't a flight officer. Colonel Smith came over to my house, and that night Jim Doolittle, Jr., was there, and Jim, Jr. and myself talked it all over, because he knew the situation, with Colonel Smith. He said he would get in touch with Gilkey as soon as

(Testimony of Pancho Barnes.)

Gilkey got back, and he phoned me that Gilkey had gotten back, or Gilkey phoned me—I think Colonel Smith phoned me—and asked if they could come over the next morning.

That was about seven o'clock in the morning when they came over, Colonel Gilkey and Colonel Smith, and I explained to Colonel Gilkey in detail the situation on the base, with the N.C.O. Club. It had been very riotous before that, and people from Los Angeles used to go up to the——

The Court: Is that important, what you are saying now?

The Witness: I think so.

The Court: Just omit it.

The Witness: I told Colonel Gilkey the situation. He asked me why I hadn't come direct to him in the first place. I told him I was sorry, but I didn't think he would appreciate me telling him how to run his Base.

He asked me what I thought he should do about it. I told him who were the ringleaders on the Base, and advised him to disperse them as soon as possible. He shipped out nine that [86] week, among them Danny Madison, and shipped them all over the country.

The Base was in order and everything was fine when Colonel Gibson was there, the investigating officer that came from Washington. Colonel Gibson put me on the stand under oath, and I testified three and a half hours as to the condition on the Base at that time. I spent most of the time during

(Testimony of Pancho Barnes.)

that testimony trying to explain to them Colonel Gilkey hadn't known the situation, and as soon as it came to his attention he had, in a very masterful way, gotten rid of all the ringleaders of this gang.

The Court: Miss Barnes, pardon the Court interrupting, but you have talked on quite some time here, and it is very difficult to separate what I call the chaff from the wheat. If there is any particular part that refers to this matter now before the Court, I wish you would reach it.

The Witness: Yes, your Honor.

Colonel Gilkey felt, at the time he was shipping these men out, he should put me out of bounds. I asked him not to do it; I felt I could handle the situation. He had already given me three armed guards, and we had about five of our own. There were eight of us going around armed at the time, in case these boys made any trouble because these ringleaders were being shipped out.

The first day we were put out of bounds, everyone in the [87] desert heard it, and the conclusion was drawn that we must have been doing something terrible to be put out of bounds. It would never occur to them to think it was to protect us from the Air Force, and not to protect the Air Force from us. Colonel Gilkey, when he did that, did not mean to give the impression that was created, did not mean to get us labelled as a house of ill repute and——

Mr. Weyman: Pardon me. I don't know to what

(Testimony of Pancho Barnes.)

this testimony is directed. That is the reason I haven't objected to it.

The Court: I wish you would get to the point.

The Witness: I am almost there, your Honor.

The Court: I wish you would.

The Witness: Because after all this happened, Colonel Gilkey became angry at me, possibly because I reported the situation to Washington, but also because I was trying so hard to catch the pyromaniac that was burning up everything on the Air Base and all around the surrounding country. I was annoying him with the pleas trying to reach him and cooperate and catch this man, and we didn't get any cooperation from him. I bothered him so much that he told me he was re-locating the main runway of the Air Base to just be sure he got rid of me, and run it straight through my place.

I knew Colonel Kluever's plan; I didn't believe him when he told me he would actually do it, but subsequent events [88] proved that is exactly what he did, and millions of dollars——

Mr. Weymann: I move that go out.

The Court: I didn't hear you, Mr. Weymann.

Mr. Weymann: I move that go out, "subsequent events proved that was exactly what he was doing." That is merely a conclusion.

The Court: It may go out.

The Witness: He told me he would re-locate the runway so it would be directed right at our place and through our place, in order to get rid of us

(Testimony of Pancho Barnes.)

there at the ranch because I was causing him too much difficulty.

The Court: Will you read that last statement.

(The statement referred to was read by the reporter.)

The Witness: Colonel Kluever——

The Court: Read that again.

(The record was again read by the reporter.)

The Witness: The original runway——

The Court: Which Colonel told you that?

The Witness: Colonel Gilkey, Colonel Signa Gilkey.

The Court: Is there anything further?

The Witness: Yes, quite a lot, your Honor.

The Court: Well, I don't want it to take up too much time. A lot of this, the connection is so slight I would say it is immaterial. I would like to get to the important part.

The Witness: Colonel Kluever is in Wadsworth General [89] Hospital right now, and he wanted to come as a witness, and was subpoenaed, in fact, as a witness,—that is, he was about to be. He made a little drawing of the original plan from his memory, and he wrote in longhand this (indicating), and had it notarized. The man that notarized it was with Colonel Kluever and brought it here to court, and, in the absence of Colonel Kluever, he is a witness. I would like very much to put his statement and the original map of the master plan in the record, your Honor.

(Testimony of Pancho Barnes.)

The Court: Did you give a copy of that to Mr. Weymann?

The Witness: May I read it, to your Honor?

(Document handed to counsel for plaintiff.)

Mr. Weymann: Of course, this is objected to.

The Court: I didn't hear you, Mr. Weymann.

Mr. Weymann: I say this is objected to, no proper foundation laid, and no opportunity for cross examination. It is simply an affidavit that is executed by a man whose relation to this proceeding hasn't been shown at all, or that he had any authority to make it.

The Court: What have you to say about this, Miss Barnes?

The Witness: I have a recommendation from Colonel Gilkey to him regarding it; I have his notarized statement in his own handwriting, made last Saturday in the General Hospital and if I can't have this in evidence now and I can take his evidence later before the Judge, he would be very glad to [90] appear. I think he would be able to in about a week.

Mr. Weymann: Of course we have a right to cross-examine.

I want to make this further observation, if the Court please: I am prepared to show that neither Colonel Gilkey nor any other Colonel at the Air Base had any authority to designate the layout of that Base. They prepared plans, yes; but until those plans were approved by competent authority, they meant nothing.

(Testimony of Pancho Barnes.)

The Court: The objection is sustained.

The Witness: May I make a remark?

The Court: Well, the Court has already ruled.

What do you want to remark about?

The Witness: I was going to remark about the fact I have tried to subpoena those plans. The original master plan was approved, and I have attempted to subpoena those plans, and subpoena General Holtoner with those plans, for deposition, in order to bring those things in; but the government has been absolutely uncooperative in any way, and never gave me a chance to take any depositions or get hold of any documents. They always have a fine excuse, for some reason; because it is the government, it can't be allowed.

I don't know why the government should be so much different. Why should they have the right to keep everything out of a reclamation suit? Why should they have the privilege of concealing everything and not allowing me to see anything? [91] I could authenticate everything, because I know——

The Court: The Court has already ruled.

Have you anything further to say?

The Witness: In about 1949, after diligently trying to catch a pyromaniac and arsonist that was attempting to burn the Air Base down, I followed his habits so very thoroughly, and also was in contact with the Sheriff's office at Los Angeles and the Sheriff's Department in Lancaster,—We were all trying to catch him. I studied his habits, and I realized he was going to come and try to burn down my

(Testimony of Pancho Barnes.)

hangar on—Do you remember the date? Anyway, it was the last part of July; I think it was my birthday, July 29, 1949. He had come around to our airport and asked the mechanic there how many people were sleeping in the hangar, and a lot of questions. I knew he was a pyro, and consequently I went to him and said, "Look, don't come around here or be on this place whatever. Stay away."

I was so concerned I went and hired two sheriffs on their off time, from Lancaster, to watch the hangar on Friday night and Saturday night of the big rodeo we were having. There were thousands of people at one of these big champion rodeos, sort of a national—an international rodeo, actually. There were thousands of people present.

I had the sheriffs there to watch for him. He came in about nine-thirty that evening, drove up to the hangar, got [92] out of the car, and went over and into the hangar, and started walking around. They watched him at first, but went over and picked him up before he had a chance to set the fire.

He had a method of using containers that would melt easily with high-test gasoline, and laying them out on concrete, and using some substance that would ignite, such as phosphorous or iodine, the arson men explained to me. I don't know how it worked. It meant he could be away from the hangar and be gone 20 or 30 minutes, say, before the fire broke out, and have a chance to have an alibi, be with someone, and be back at the fire for the excitement.

(Testimony of Pancho Barnes.)

When the sheriffs picked him up, they picked him up before he had a chance to light the fire, although he had all the equipment to light the fire and the whole thing was obvious, inasmuch as we had followed him so closely and knew what he was going to do.

When they picked him up they found a concealed weapon on him, and preferred charges of carrying concealed weapons. He was tried for carrying concealed weapons, and sentenced to six months in the County Jail in Bakersfield. He was a soldier from the Air Base. He was the driver that drove the legal officer, Major Wallie Horlick, around. Major Horlick did a lot of checking on all the fires that occurred on the Base, and all during that time his driver was right with him, and that was the man that we caught. [93]

As I say, Colonel Gilkey wouldn't help us with it. Consequently the pyromaniac was in jail at the time General Boyd took command. I went to General Boyd——

The Court: Does that have anything to do with this particular matter before the Court?

The Witness: Yes, your Honor.

The Court: Explain what it has to do with it.

Mr. Weymann: I haven't objected to any of this testimony.

The Witness: Your Honor, what I am establishing and what I will prove with my witnesses is that everything I am saying is true. It is on bad faith. My reputation has been blackened on account of

(Testimony of Pancho Barnes.)

trying to get rid of me, and they re-located the runway on my place because all this happened. Since in 1945, when they refused to re-open my airport, they have showed continuous bad faith on the part of the Air Force. They have let my reputation be blackened for eight years, and now the FBI has been chasing us six months that I know of, and confronting guests and people on the ranch. I estimate——

The Court: You are making an argument now.

The Witness: No, I am stating what I will prove.

The Court: I say you are making an argument. I don't want any discussion.

The Witness: Yes, your Honor.

The Court: I only want you to testify to the facts. If you have any facts to present that will relate to the [94] matters before the Court, you may tell them.

The Witness: I attended a meeting I spoke of previously, when the C.A.A., the Navy and the Air Force voted whether my field should be opened or not. The C.A.A. and the Navy voted "Yes", and even at that time the Air Force voted "No", to try to keep it closed back in 1945.

They have "bucked" me in a great many things. While I have been very friendly and love the Air Force and a great many people in it, at the same time there have been people on it that have tried to crush me. They have the FBI right at this time

(Testimony of Pancho Barnes.)

checking on my place, embarrassing my guests and embarrassing former employees.

The Court: Is there any further testimony you wish to present?

The Witness: I know for a fact, your Honor absolutely, that the runway ran to the south of the —to the lower end of Muroc Lake, across the chain of lakes into Rosamond Lake, the east-west, and the north-south up and down the lake. I know for a fact that is where it was designed; and I know they re-located it. I don't know why they re-located it but I know Colonel Gilkey told me they re-located it in order to run it through my property. [95]

* * * * *

Miss Barnes: May I call Colonel Akers under Section 2055 as an adverse witness?

The Court: That isn't exactly the section to call the witness under in the Federal Court, but the Court knows what you mean.

Miss Barnes: Well, as an adverse witness under the proper section, your Honor.

The Court: Very well.

MARION J. AKERS

called as an adverse witness by the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Marion J. Akers.

The Clerk: Colonel Marion J. Akers, A-k-e-r-s.

Examination

Q. (By Miss Barnes): Colonel Akers, what is your capacity at the Air Base?

A. My duty or assignment is Chief of Staff, Air Force Flight Test Center.

Mr. Weymann: Colonel, if you will, speak up a little more loudly if you can, please. I can't hear you.

Q. (By Miss Barnes): Colonel Akers, I subpoenaed you as an adverse witness duces tecum with the same enclosures and maps that you had here in court on the 9th of September. Will you please produce those maps? [98]

* * * * *

Mr. McKendry: I am sorry. The statement I would like to make is the map they had in court on September 9th was much larger, and the right hand side of the map was on the edge of Muroc Lake. This map shows 20 miles on further. The maps [101] in court on September 9th were much larger than these. There is very little similarity at all.

Mr. Weymann: Colonel Akers is under oath. He can be examined.

(Testimony of Marion J. Akers.)

The Court: Well, you are an attorney and an officer of the court.

Mr. Weymann: I am, your Honor.

The Court: These have been in your possession?

Mr. Weymann: These have been in my possession since September 9th, and in my files.

The Court: And these are the same maps?

Mr. Weymann: Those are the same maps I showed Colonel Akers the last time he testified.

The Court: Just glancing at them, they appear to be the same maps that I saw.

Mr. Weymann: These sketches——

Miss Barnes: This——

The Court: Wait a minute. What is the number of this map?

Miss Barnes: What is “this map”?

The Court: This is Enclosure No. 1.

Miss Barnes: I would like to tell you about it. Am I in order telling you about it?

The Court: If you can point out any discrepancy between this and any other map that was used, do it. [102]

Miss Barnes: It is very simple, your Honor. The other map was far larger. It was done in crayon—I believe it was crayon. It was colored a blue-green color. It ended at the Air Base, the east end of Muroc Lake. It didn't take in as much territory. The map itself was much larger. This is not the same map, your Honor. I know positively.

The Court: That is all right; just stand aside. Is there something you desire to say?

(Testimony of Marion J. Akers.)

Mr. McKendry: Yes, your Honor. Page 8 of the transcript, line 17, Mr. Weymann stated——

Miss Barnes: Put Mr. Weymann on the stand under oath.

The Court: Wait a minute, Miss Barnes. Don't keep interrupting.

Mr. McKendry: (Reading)

"Mr. Weymann: I expect to show by Colonel Akers, who is Chief of Staff at this station, that this property lies in the very center of the Edwards Air Force Base."

And the map in court September 9th did show that property in question was in the center of that map and the proposed military reservation.

This map in court today, which is not the same map, shows an additional 20 miles east of what the other map did.

The Court: Let's try to figure this out.

(Court examining documents.)

The Court: When you speak of the "dumb bells" are [103] these (indicating) the ones?

The Witness: Yes, those are the turn-around points, commonly referred to as "dumb bells".

The Court: Now, may I have Enclosure No. 3.

(Document handed to the Court.)

The Court: Mrs. Buck, will you read the offer Miss Barnes made about receiving these maps into evidence?

(Record read by reporter as follows:

"I want them marked for identification, your

(Testimony of Marion J. Akers.)

Honor, so they won't get away from us again.'')

The Court: Let them be marked for identification. What is the next number?

The Clerk: Pancho Barnes' Exhibit 2.

Miss Barnes: I want the original maps——

The Court: The one marked "Enclosure No. 1" will be marked Pancho Barnes' Exhibit 2; the one marked "Enclosure No. 2" will be marked Pancho Barnes' Exhibit No. 3; and the one marked in pencil "Enclosure No. 3" will be marked as Pancho Barnes' Exhibit No. 4, for identification. All these maps are for identification.

(The maps referred to were marked as Pancho Barnes' Exhibits Nos. 2, 3 and 4, respectively, for identification.)

The Court: There was also offered this transcript of September 9, 1953, pages 1 to 36, inclusive, in the case of [104] United States of America vs. 360 Acres of Land in Kern County, action No. 1253-ND. Let that be received into evidence and marked as Pancho Barnes' Exhibit No. 5. That may be received in evidence; these maps are marked for identification.

(The transcript referred to was marked Pancho Barnes' Exhibit No. 5, and was received in evidence.)

The Court: I wouldn't handle these too much, Mr. Eiland.

Mr. Weymann: I would like to state to the Court I definitely resent the insinuation of the defendants that I have been a party to any falsifica-

(Testimony of Marion J. Akers.)

tion of testimony or exhibits offered. In more than 30 years at the bar, that is the first time any insinuation has been made of such nature, and I resent it deeply.

The Court: I suppose you do not expect the Court to make any statement in regard to what you said.

Mr. Weymann: I don't believe it will be necessary, your Honor.

The Court: I didn't hear you.

Mr. Weymann: I don't believe it will be necessary.

The Court: Have you any further cross examination?

Miss Barnes: Yes, indeed I have, your Honor.

The Court: I may state I have read all of the transcript that was received in evidence, and have examined the maps carefully.

Miss Barnes: I don't really need to look at the maps, [105] your Honor; I can see the original maps, and I can see those. I happen to have what is called photographic memory, and I remember the original maps perfectly, and that they did not extend to the east of Muroc Dry Lake. All three of them were the same.

These are three separate maps to the maps brought in to court before. However, regarding them there is a certain similarity between these maps and the other maps. For instance, they show nine spots on the lake. They are not grouped the same as they were on the original map, your Honor.

(Testimony of Marion J. Akers.)

They were grouped at that time more as one group, and are now strung out.

Then they showed another theoretical runway right across the defendants' property, showing a transposition of dots across the defendants' runway. They use the same pattern again, which again is not the same as it was on the original maps exhibited.

The Court: You are now referring to Enclosure No. 3?

Miss Barnes: I am referring to the dots on the dry lake, transposed again——

The Court: These (indicating) are the dots?

Miss Barnes: That is right.

The Court: On Enclosure No. 3.

Miss Barnes: I am referring to Enclosure No. 3.

If you will remember, your Honor, on the original map they presented, those pink dots were more grouped together, [106] and went past the yellow spot on the map.

The Court: You may proceed, Miss Barnes.

Miss Barnes: I referred to these dots (indicating), your Honor. They showed the nine green dots, and then the nine pink dots as transposed. On the original map the green dots were grouped down toward the edge of Muroc Dry Lake, in a closer group, then, when transposed, they were transposed in exactly the same manner, in the same position, and showing them transposed over the defendants' property, but farther out, in other words past the yellow mark of the defendants' property, in a far closer group.

(Testimony of Marion J. Akers.)

I would like now to ask Colonel Akers, these nine accidents that you have shown there on the map, how did they occur?

The Court: Oh, I don't believe you need go into that.

Miss Barnes: That is very important, your Honor, because he is trying to prove that these accidents were take-off accidents, and if they were——

The Court: You may have a few minutes on that, not very long.

Q. (By Miss Barnes): How did those accidents occur, Colonel Akers?

A. May it please the Court, I don't know what accident she is talking about. I have not had an opportunity to review the map. [107]

The Court: She is referring to these green dots on the map.

The Witness: I want to be sure we are talking about the same thing. I haven't had a chance to see the maps in question.

Q. (By Miss Barnes): Not these maps, but you saw the maps we had in court September 9th, did you not, Colonel Akers?

The Witness: May I ask the question be restated?

Miss Barnes: I say——

The Court: No, let the question be read.

(Pending question read by reporter.)

Mr. Weymann: I object to the form of the question.

The Court: The objection is overruled.

(Testimony of Marion J. Akers.)

Now, pay attention to the question. Read it again.

(The last question was again read by reporter.)

The Witness: I am trying to ascertain, may it please the Court, which question I am to answer first.

The Court: Answer the last question first. Read it.

(The last question was again read by reporter.)

The Witness: Yes, I saw the maps which we had in court on September 9th, which, incidentally, are the same maps we have here.

The Court: Now, read the other question, if there is one pending. [108]

(The question referred to was read by the reporter as follows:

“Q. How did those accidents occur, Colonel Akers?”)

The Witness: May it please the Court, the detained explanation as to causes and results of certain accidents are classified information. I can state generally these accidents occurred during the course of processing and testing certain types of aircraft.

The Court: That is a sufficient answer.

Q. (By Miss Barnes): Colonel Akers, is it true that these accidents, as specified on the map, actually occurred? Do those dots actually authenticate an accident? I am not asking for secret disclosures. Are those dots actually an accident, and can you prove they are accidents?

(Testimony of Marion J. Akers.)

The Court: Not what he can prove.

Do you know, did accidents actually occur at the places where the green spots occur?

The Witness: At those locations, yes, sir.

Q. (By Miss Barnes): Over what period of years did these accidents occur?

A. As I recall it, it was during a period of time from 1949 through 1952.

The Court: Any further questions?

Miss Barnes: Yes, your Honor. It is very important—— [109]

The Court: Proceed.

Miss Barnes: This has to do also with——

The Court: Proceed.

Q. (By Miss Barnes): Where did you get the information that these accidents had occurred, in order to put them onto these maps?

A. I obtained the information from the files of the aircraft accidents.

Q. Who made those maps, Colonel Akers?

A. Which maps?

Q. The ones we have in court today. Who made those, and who made the ones we had the other day? Did a different party make——

The Court: He testified they are the same. Don't continue to refer to other maps.

Miss Barnes: Okay.

Q. Who made these maps?

A. I can't tell exactly which individual made them. They were made under my direction and supervision.

(Testimony of Marion J. Akers.)

Q. Who did you direct to make them?

A. I assigned the function to Lieutenant Colonel Elvin.

Q. And do you know whether or not these accidents, as marked, were actually authentic accidents, or whether he just made a group of accidents?

The Court: That has been asked and answered. Don't [110] answer.

Q. (By Miss Barnes): Colonel Akers, in the original hearing on the 9th of September, you implied in that transcript that the defendants' property was in danger because of aircraft accidents; did you not?

The Court: Without regard to whether he implied it or not, from the transposition of these dots where the accidents occurred here, and placing them on this proposed runway,—

This (indicating) is the old runway, is it not?

The Witness: That is the runway on the lake bed, your Honor.

The Court: That is the present one?

The Witness: That is an existing runway on the lake bed.

The Court: It is now being used?

The Witness: It is now being used.

The Court: Is it proposed to place your runway as indicated by this diagonal—I won't say "diagonal"—by this straight runway which is marked here (indicating), and on which the yellow spot is about half way in the middle?

(Testimony of Marion J. Akers.)

The Witness: The runway, your Honor, is shown there approximately the center of the map.

This (indicating) is the proposed runway and is presently under construction. The area, the rectangular area within that is the clear zone area on either side of the runway and [14] off the ends. It will not all be runway, only this portion shown here in heavy lines.

The Court: That is from this part (indicating)—there is no mark here but we will say this heavy line which appears about where the Judge has his finger, to this place here (indicating) where the Judge also has his finger, is that correct?

The Witness: That is correct.

The Court: Suppose we mark that "A" and "B"; is that satisfactory, Mrs. Barnes?

Miss Barnes: If they get it right, your Honor; if they mark it correctly.

The Court: We will see it is right.

Is this——

The Witness: East.

The Court: This (indicating) is east, and this (indicating) is north?

The Witness: Yes, sir.

The Court: And this proposed line here runs northeasterly and southwesterly?

The Witness: That is correct.

The Court: I will put the "A" at the point of intersection, then. That is the beginning of the proposed runway?

(Testimony of Marion J. Akers.)

The Witness: That is the approximate location, yes, sir.

The Court: And "B" will be at the other end of the [112] proposed runway here (indicating)?

The Witness: That is correct.

(The Court marking on exhibit.)

The Court: Is that satisfactory to you, "A" and "B" (indicating)?

Miss Barnes: That is approximately right, your Honor.

I would like to prove a certain thing, your Honor.

The Court: What is it you want to prove?

Miss Barnes: I would like to prove, your Honor, that Colonel Akers is trying to claim we are in a position of danger by showing these accidents ran out along the line. They are actually made on the dry lake. Those are landing accidents, when people come back. They weren't made on take-offs, if they are any accidents at all.

In other words, I don't know if they are authentic accidents. I don't believe they are very careful about it. They are different groupings than they had on the original map.

The Court: The Court has to rule on that. You may proceed with your cross-examination.

Q. (By Miss Barnes): You mentioned, on September 9th, that you likened our place to Elizabeth, New Jersey, or Newark, the accident there, and that those things could happen here, and that

(Testimony of Marion J. Akers.)

is the reason you needed the space in front of the runway. Do you remember that? [113]

A. Is that a question or a statement.

The Court: That is a question.

Miss Barnes: I say, do you remember that you likened it——

The Court: It is in the record substantially as Miss Barnes stated it. Let me show it to you.

Miss Barnes: Page 22, your Honor.

The Court: Colonel, will you read it, beginning here (indicating). Don't read it out loud; just read to yourself, beginning with this line (indicating).

(Witness referring to transcript.)

The Court: Now, what is your question, Miss Barnes? He has read the transcript; he understands it.

Q. (By Miss Barnes): Would you compare this situation to what you call the Elizabeth, New Jersey airport, the Newark airport?

A. It is a matter of definition of "comparison." There is a similarity of cases, in my opinion.

Q. Do you know that there was an open investigating committee——

The Court: Don't ask any more questions about what happened back in New Jersey.

Q. (By Miss Barnes): I would like you to answer "yes" or "no" whether those accidents were take-off or landing accidents. Not "yes" [114] or "no". Were those accidents on take-offs?

(Testimony of Marion J. Akers.)

A. Not all of them, no. Those accidents, as I recall, were both take-off and landing accidents.

Q. How many take-off accidents do you think there were?

A. I don't recall the numbers.

The Court: Have you any further cross-examination?

Miss Barnes: Yes. Can we look at the maps?

The Court: Yes, but——

Miss Barnes: Well, I won't.

The Court: You may look at them.

Miss Barnes: There is quite a difference in them, your Honor.

The Court: You keep saying there is quite a difference in them.

Miss Barnes: There is.

The Court: Because the Court doesn't say anything doesn't mean he agrees with you.

Mr. Lazar: Your Honor, I would like to apply to the Court, as to the necessity, to appear as *amicus curae*, again. Since that is the point in question, and since Colonel Akers seems to be the responsible officer that can testify to that, and it is a determining factor in the government's cases that are going to come up, we should be given the opportunity of cross-examining him as to what their concept of necessity is and how far it extends. [115]

The Court: The Court will consider that.

Miss Barnes: Could we look at the maps without touching them? Just hold them up a little?

(Testimony of Marion J. Akers.)

The Court: Is this (indicating) the one you want to see?

Miss Barnes: No. 1.

The Court: It says "Military Reservation" in green and "Barnes and McKendry property" in yellow; and the testimony in the record is that this is not drawn to scale, because, as I understand it, it would not be as large as that, and would be larger than a pin point.

Miss Barnes: Well, that——

The Court: Wait.

Miss Barnes asked you if it would be merely a pin point, and you answered no, but it wouldn't be as large as it is here?

The Witness: I believe the testimony indicates I stated there was no attempt to draw these maps accurately; it was merely used to indicate——

The Court: That is clear from the record.

The Court will take a recess at this time until 10:00 o'clock tomorrow. [116]

* * * * *

Wednesday, October 28, 1953. 10:00 a.m.

The Clerk: The case of No. 1253, United States vs. Barnes, et al., which was on trial yesterday, won't be able to go on this morning. Judge Beaumont is sick; so the case that is supposed to go on this morning will go over until Friday morning, October 30th, at 10:00 o'clock.

All the witnesses that are here are ordered to return into court Friday morning at 10:00 o'clock.

That is all.

(Whereupon the further hearing in the above entitled matter was continued to Friday, October 30, 1953, at 10:00 o'clock a.m.) [123]

Friday, October 30, 1953. 10:00 a.m.

* * * * *

DeWOLFE H. MILLER

called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: DeWolfe H. Miller. [126]

The Clerk: D-e-W-o-l-f-e?

The Witness: D-e-W-o-l-f-e.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Weymann): Colonel Miller, you are a Colonel in the United States Air Force?

A. That is correct.

Q. And to what branch of the Air Force are you assigned?

A. I am assigned as Director of Installations Headquarters, Air Research—

The Court: Talk a little louder.

The Witness: I am assigned as Director of Installations, Air Research and Development Command, with headquarters at Baltimore, Maryland.

Q. (By Mr. Weymann): And in that capacity, are you familiar with the so-called Master Plan of the Edwards Air Force Base?

A. I am.

(Testimony of DeWolfe H. Miller.)

Q. And with particular reference to the Flight Test Center? A. Yes, sir.

Q. And the test runway under construction?

A. Yes, sir.

Q. Do you know who designed the Master Plan which is [127] now adopted and in effect?

A. Yes, sir.

Q. Who designed it?

A. The J. Gordon Turnbull Company. [128]

* * * * *

Q. (By Mr. Weymann): And they submitted a report on their conclusions? [130]

A. That is right. That report was made and presented to the Air Staff.

Q. And then what action was taken?

A. On that basis, we requested the necessary funds from Congress to put that plan in effect.

The Court: Read that answer.

(The answer was read.)

The Court: Who requested?

The Witness: Sir, the formulation of the Public Works program by which we get funds from Congress to build structures or acquire land is formulated at the station, reviewed by the Major Command, submitted to Air Force, where it is again reviewed, and goes through the regular legislative channels to the Congress.

The Court: I don't recall whether you said "We made the request"——

The Witness: What I meant was Air Force made the request.

(Testimony of DeWolfe H. Miller.)

Q. (By Mr. Weymann): Air Force, that is, the Command at Baltimore?

A. Actually it would be the Command at Baltimore would submit their program to Headquarters in Air Force, which in turn goes to the Department of Defense, and eventually to the committees of Congress.

The Court: Read that last statement.

(The answer was read by the reporter as follows: [131] "Actually it would be the Command at Baltimore would submit their program to Headquarters"—)

The Court: Where are the Headquarters?

The Witness: Headquarters, United States Air Force, Washington, D. C.

Q. (By Mr. Weymann): And upon that approval by the head of the Air Force, the Air Force Command, did the Secretary of the Air Force authorize the condemnation of the subject property?

A. I believe that is the usual procedure.

The Court: Read that Answer.

(The Answer referred to was read by the Reporter.)

The Court: That is not a sufficient answer. That answer may go out.

Q. (By Mr. Weymann): Do you know if the Secretary of the Air Force approved the plan submitted? A. Yes, sir.

The Court: Well, did he?

The Witness: Yes, sir. His committee approved

(Testimony of DeWolfe H. Miller.)

the—the Chief of Staff of the Air Force, acting for him, approved it.

Mr. Weymann: That is all. You may cross-examine.

Cross Examination

Q. (By Miss Barnes): [132] Colonel Miller, were you ever stationed at Muroc Air Base?

A. I was attached there for approximately two weeks.

Q. And at what time, what period, what date?

A. That was in December 1940. The first few buildings on the new Base were under construction.

Q. Who was the Commanding Officer at that time?

A. Colonel—Captain at that time,—I can't recall his name.

Q. Arbogast? A. Arbogast.

Q. It would be now Colonel Arbogast?

A. It is now Colonel Arbogast.

Q. Was that the same Colonel Arbogast that testified here, in fact, I think, one of the two opening witnesses I had? A. That is correct.

Q. That is the same man. Colonel Arbogast testified, if you will remember, that that was a test base previous to the war.

Can you remember that testimony he gave?

A. I do.

Q. Is that correct?

A. I was not charged with knowledge at that time of the mission of the Base. To my knowledge,

(Testimony of DeWolfe H. Miller.)

it was considered [133] mainly a bombing range for March Field.

Q. In other words, they were testing bombs, is that correct?

A. Dropping bombs in the usual pattern.

Q. Wouldn't you say that was test work?

A. No, I would say it was crew training.

Q. Whose recommendations did the Turnbull Company use regarding the Master Plan?

A. Their own, I presume. That is why they are employed, is to evaluate the condition and requirements as they see them, and to formulate a plan to fit those requirements.

Q. I believe you stated, under your examination by Mr. Weymann, that the information was gathered at the Air Base.

A. That is basic information that I referred to.

Q. Who gathered that basic information at the Air Base?

A. That basic information was probably gathered in part by personnel of the Base, in part by or with the assistance, shall we say, of the Los Angeles District Engineer.

Q. Would you know anyone in particular that worked on that? A. No, I do not.

Q. What year was that information gathered?

A. Generally during the period from 1946 to 1948. [134] However, before the—the usual procedure is that when you employ a firm to develop a Master Plan, they will take what information is

(Testimony of DeWolfe H. Miller.)

available and bring it up to date, and from that they start their planning.

Q. Can you please give me the date in December 1950—you testified it was approved in December 1950. What was the exact date on that, do you know?

A. I do not have the exact date on that.

Q. The first of the month, or the latter part of the month?

A. I know it was in December, but I do not have the exact information here. I can get that if it is important.

Q. Do you know the date that Baltimore approved the final plan?

A. It would be previous to that.

Q. How much previous?

A. It could be as much as a year previous.

Q. Could it be more than a year previous?

A. It would be possible.

Q. What year, what date, did Baltimore start as head of the A. R. D. C., which is short for Air Reserve Development Command.

A. I do not know. It was in the general neighborhood, I believe, of 1950. Formerly the function had been combined with the Air Materiel Command. [135]

Q. Then how could Baltimore approve it in 1949, if they didn't start until 1950?

A. The approval by the Major Command was previous to 1950. It could have been A. M. C. or

(Testimony of DeWolfe H. Miller.)

A. R. D. C. The plan does not become a valid plan——

The Court: Will you repeat that.

(The answer was read by the reporter as follows: "The approval by the Major Command was previous to 1950. It could have been A. M. C."——)

The Court: What is "A. M. C."?

The Witness: Air Materiel Command.

The Court: Now read the next.

(Reading of answer continued as follows:
"——or A. R. D. C."——)

The Court: What is "A. R. D. C."?

The Witness: Air Reserve Development Command.

The Court: Proceed.

Q. (By Miss Barnes): You say the contractors J. Gordon Turnbull Company was the company that made these plans, is that correct?

A. That is correct.

Q. What background in aviation enabled these contractors to properly evaluate the flying needs?

A. J. Gordon Turnbull is a firm of national reputation, has done master planning on several large contracts, and, with [136] their contacts with industry, they deemed capable of developing a suitable plan.

The Court: Pardon me. Do you know of your own knowledge whether they arranged any of the plans of a similar nature prior to this date?

The Witness: I can not say specifically what air

(Testimony of DeWolfe H. Miller.)

fields they have made the Master Plans on. I can gather information on that very easily.

The Court: I just wanted to know.

The Witness: I can say this, that the firms which are selected have to submit pre-qualifications, and the planning and determination secured from the Secretary of Air are made before we can employ any firm to draw a Master Plan contract.

Q. (By Miss Barnes): Do you know the cost of the Turnbull Master Plan, what the engineering firm received for making the plan?

Mr. Weymann: I object to that. It is entirely immaterial and irrelevant.

The Court: I think it is immaterial. Objection sustained.

Q. (By Miss Barnes): Do you know the cost of the——

I want to make an offer of proof.

The Court: You may make your offer of proof.

Miss Barnes: That because of changes in this Master Plan, which I will prove to your Honor it was done for spite, it has caused and will cause the government millions and millions of dollars, because they are going to have to change——

The Court: Make the offer of proof.

Miss Barnes: That is my offer of proof.

Q. The firm of Periera and Luckman, did you testify they had made a previous plan?

A. Previous to what plan?

Q. Previous to the Turnbull plan.

A. I stated they had evaluated it and made a

(Testimony of DeWolfe H. Miller.)

separate determination which coincided with the Turnbull plan, or essentially to that effect.

Q. On these Boards on the field, would any consideration have been given by these contractors, these planners, the architects that make the plan, to the knowledge of the test pilots and local Board on the field?

A. I do not quite understand your question.

Q. Would the company that made these plans be influenced by the regard of the local experts in the Air Force on the field, that do the test work?

A. Yes, their opinions and advice would be taken into consideration.

The Court: Well, you spoke of the hiring of Periera [138] and Luckman to make this re-evaluation. Did they make it on the basis of the plan that had been submitted by the J. Gordon Turnbull Company, or did they make it originally?

The Witness: They made, and were requested to make, a separate evaluation, disregarding the Turnbull plan, to see what they would come up with.

The Court: Did they have the Turnbull Plan before them when they did that?

The Witness: I would say yes. The information was available.

There is one point I would like to make, if I may.

The Court: You may make it if you wish.

The Witness: The approval of a plan by the Base Development Board or the Major Command

(Testimony of DeWolfe H. Miller.)

is nothing more than a routine approval. A Master Plan is not considered valid and finally approved until it is approved by Headquarters, United States Air Force.

So any approval prior to that places the plan generally in the category of a preliminary Master Plan.

The Court: Proceed, Do you have any further questions?

Miss Barnes: I want to talk about this map, your Honor. I have shown it to Mr. Weymann, and I want to offer it in evidence.

Mr. Weymann: It is improper cross-examination. I didn't go into any of this. [139]

Miss Barnes: I want to ask him questions regarding this map. He made certain statements, Mr. Weymann.

The Court: Well, you lay your foundation for the questions.

Q. (By Miss Barnes): Will you state what that map is, Colonel Miller?

(Handing document to the witness.)

A. It is labeled A Vicinity Map, Muroc Army Air Field.

Q. Who was the map approved by?

A. It was approved here by Colonel Gilkey.

The Court: By whom?

The Witness: Colonel Gilkey.

Q. (By Miss Barnes): What year? What date?

A. 12 March 1947.

Q. Does it show any revisions?

(Testimony of DeWolfe H. Miller.)

A. Yes, it does.

Q. What are they?

A. They show the addition of the Rocket Static Test.

Q. What date was that?

A. On 12 December 1947.

Q. What else do they show?

A. Runway relocation, 21 September 1950.

Q. That doesn't say that, I don't believe. I believe you will find, Colonel, if you look a little closer, the [140] only date there is December 12th.

A. What is this date (indicating)?

Q. That is another date with some initials, some letters; I don't understand what they are.

A. Usually the procedure on this——

The Court: Talk louder.

The Witness: Usually the change on a map is shown and it is dated. And it is not uncommon for the person who made the change to put his initials; and I would assume this is the runway relocation, 21 September 1950, by B. N. M., whoever he may be.

Mr. McKendry: Your Honor, may I ask a question?

Mr. Weymann: If your Honor please——

The Court: Wait a minute, this gentleman wants to ask a question.

Speak to Miss Barnes and let her ask it. It is better to have one doing the questioning.

(Defendants conferring.)

Q. (By Miss Barnes): I believe, Colonel Miller,

(Testimony of DeWolfe H. Miller.)

if you look closely—here is the magnifying glass—there are two revisions, (a) and (b), both bearing the date of December 12th, 1947.

A. I see you do have two changes there.

The Court: What is that answer?

The Witness: There are two changes, (a) and (b) dated [141] 12 December 1947.

The Court: Is there any change there in 1950?

The Witness: The change—

The Court: The one you referred to before?

The Witness: The change in 1950 reads “21 September 1950, B. N. M.” I do not know what that stands for.

The Court: Was that the one you referred to before?

The Witness: Yes. My original interpretation was incorrect. There are two changes shown for 12 December 1947, (a), Rocket Static Test, (b), Runway Relocation.

The Court: May I, as a matter of understanding, take a look at that map?

Miss Barnes: I was going to ask him this question—

Mr. Weymann: Your Honor,—

(Document was handed to the Court.)

The Court: You may proceed.

Oh, Mr. Weymann, you were about to say something and I interrupted.

Mr. Weymann: I would like to inquire how the Defendants acquired possession of this map. That is the official map of the Edwards Air Force Base,

(Testimony of DeWolfe H. Miller.)

and it is government property; and I would like to know how these Defendants acquired it.

Miss Barnes: I would like to let Colonel Miller answer that question.

Q. Anywhere on that map is it listed as restricted [142] information or secret or confidential?

A. I do not see it so marked.

Mr. Weymann: But the map, on the face of it, is government property.

Q. (By Miss Barnes): Would maps like this be used by many contractors and many architects and people working on the Base? In other words, many hundreds of people could have or receive maps like this; is that not true?

A. Yes, it could be seen, as long as it is not a restricted map.

Miss Barnes: I think that answers the question, your Honor.

The Court: Well, have you any further questions?

Miss Barnes: Yes, I wanted Colonel Miller to point out now the relocated runway, and where it runs in relation to the Defendants property.

The Witness: This particular study shows the runway generally extending across the dry lakes, and the approach zone extends over the Barnes airfield. There are probably in the files a great number of studies of this type.

The Court: Read that answer, Mrs. Buck.

(The answer referred to was read by the Reporter.)

No. 15580

United States
Court of Appeals
for the Ninth Circuit

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BARNES, also known as Pancho Barnes and
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Testimony of DeWolfe H. Miller.)

The Court: Now, does that map indicate when the relocation was made? [143]

The Witness: The relocation which is shown on this particular map shows the change of 12 December 1947.

The Court: Now, will you point out where that relocation is?

The Witness: Here (indicating) was the existing runway, and here (indicating) is the relocated.

The Court: Now, what is there to indicate that when that particular relocation was made—I want to pin it down to that particular relocation.

The Witness: I am missing your point there, sir.

The Court: Well, you say there was a relocation made on December 12, 1947.

The Witness: That is what this map shows, yes, sir.

The Court: Will you point out where that relocation is?

The Witness: The relocation shown on this map would put the new runway generally running northeast-southwest, with the southwest approach zone over the Barnes airfield.

The Court: It isn't clear to me where it was before and where it is now.

The Witness: Here the old existing runway is, to the south (indicating).

The Court: Where is the new?

The Witness: It will extend from there (indi-

(Testimony of DeWolfe H. Miller.)

cating) to there (indicating), the actual runway on this plan, with the approach zones. [144]

The Court: Where is the Muroc Dry Lake?

The Witness: Down in this area here (indicating), out towards——

Miss Barnes: This (indicating) will make it much clearer.

The Court: Wait.

The Witness: This (indicating) is essentially the edge of the lake right here, Rogers Dry Lake.

The Court: The west edge of the lake?

The Witness: Yes, sir.

The Court: How far does it extend?

The Witness: Rogers Dry Lake?

The Court: Just approximately.

The Witness: I think altogether about 15 miles.

Q. In what direction does it extend?

The Witness: Generally in a north-south direction.

The Court: Well, would it extend in a north-easterly direction from the point you marked here, or would it just be on the west edge there?

The Witness: No, sir. This area in here (indicating) is relatively flat.

The Court: Is that part of the lake?

The Witness: I believe the lake extends right to about here (indicating). [145]

Q. (By Miss Barnes): Colonel Miller, is this necessarily a relocation of the present runway that is used, or could it have been a relocation of other runways that were also shown? Could it be a re-

Testimony of DeWolfe H. Miller.)

location of some other runway besides this one you pointed out, do you know? A. No.

Q. You don't know?

A. As far as I know, it could not. When the final construction was approved, it was for a particular test type runway, something special in the Air Force.

The Court: Would you consider this a preliminary matter, or is this a final——

The Witness: This is, as far as I would consider it, a preliminary matter. This is not necessarily the final one although it may coincide with the location that was approved under the approved Master Plan.

Q. (By Miss Barnes): Who approved it there?

A. Colonel Gilkey is the only one that approved it here, but his approval is not final.

The Court: What is the date of his approval?

The Witness: The basic map was approved by Colonel Gilkey apparently on 12 March. The revisions——

The Court: What year?

The Witness: 1947. The revisions—— [146]

The Court: Now, you made some statement about Colonel Gilkey's approval.

Read that, Mrs. Buck.

(The record referred to was read by the reporter.)

The Court: You may proceed.

Miss Barnes: I have an Engineers Corps map——

(Testimony of DeWolfe H. Miller.)

The Court: I think this map had better be marked for identification. Let it be marked——

The Clerk: No. 6.

The Court: ——Pancho Barnes' No. 6 for identification.

(The map referred to was marked as Pancho Barnes' exhibit 6 for identification.)

Miss Barnes: Mr. Weymann, would you look at this exhibit?

(Parties examining the map.)

Miss Barnes: You stated on September 9th that the Defendants' property was in the very center of the Edwards Air Force Base itself.

Mr. Weymann: I didn't testify.

What are these marks (indicating)?

The Court: I didn't hear that statement.

Mr. Weymann: I say I want to know what the marks are.

The Court: Do you know what they are?

Mr. Weymann: No, I don't.

Miss Barnes: The green line, the green crayon [147] marks—the Defendants put these marks on indicating the proposed new runway, the relocated runway that is on the other map,—this is the present map, an Engineers' map, your Honor, absolutely accurate, as to scale.

This (indicating) is the present runway they are now using; and we have made the exact flight patterns. They show these flight patterns coming on the Defendants' property, which is erroneous. The

(Testimony of DeWolfe H. Miller.)

new runway which will be put in will come across the Defendants' property.

They testified in their brief—Colonel Akers testified that it would have a two-mile clear way, which means they are going to have to abolish the entire Base and wipe out entirely the Air Base before they can use this runway; before they can go to grading or paving it, they will have to move a good portion to the Air Base to get that going. They wanted possession of all property, because they said they had to have it——

Mr. Weymann: I object to argument.

The Court: You don't argue now.

Miss Barnes: I want to ask Colonel Miller about that particular portion.

Q. Colonel Akers testified, Colonel Miller,—I am addressing this to you — Colonel Akers testified there would be a two-mile clear way on each side of the new runway when it was completed, one mile [148] on each side, two miles altogether. These lines indicated, here is the 15,000-foot strip—incidentally, this map is to scale; each of these squares is a square mile. This map shows the 15,000-foot runway, as near as we could get it from the Air Base map and the map we showed you this morning, on each side it will have a mile square.

Now, you are an installations officer here. In all this clear way, which we have only indicated there and haven't extended as they have in the maps in the exhibit, when this is completed what buildings is this going to necessitate the removal of?

(Testimony of DeWolfe H. Miller.)

A. Essentially all that now exist.

Q. On the entire Base, is that right?

The Court: What was the answer, Mrs. Buck?

(The answer referred to was read by the Reporter.)

The Witness: That is the bulk of what exists and what is commonly called and which we refer to as the old Base. This does not affect the north Base or the Rocket Static site to the east,—

Q. (By Miss Barnes): When you say “north Base”, you refer to the buildings grouped up at this end (indicating)? A. Right.

Q. It would include—

A. It means essentially you take this Base and abandon it. [149]

The Court: It would include all within those two lines that run up a mile each side of the runway? That would be all runway, then?

Miss Barnes: That is the hospital, too (indicating).

The Court: All within that space?

The Witness: We do have, as testified before, an approach angle that covers the height of the buildings in certain areas. This (indicating), however, would be cleared out.

The Court: The Court will take a recess at this time.

(Short recess taken.)

The Court: Proceed.

Q. (By Miss Barnes): You made a statement, Colonel Miller, that the Air Force Base at Muroc

Testimony of DeWolfe H. Miller.)

and been used as a training base until 1946. Will you clarify that?

The Court: Read the question, Mrs. Buck.

(The question referred to was read by the Reporter.)

The Witness: The main mission of the Base for the general period of 1940 to 1946 was for training of Air Force Personnel.

Q. (By Miss Barnes): Why was it for training at that time, do you know that answer, Colonel?

A. No, I do not. I presume to take advantage of the climate and the dry lakes. [151]

* * * *

Q. Colonel Miller, if you will, look at this map. This is an Army Engineers map, and it is absolutely scale. Each one of these squares represents a square mile. Each one is a square mile. If you would care to count these squares, you could locate everything in mileage.

If this entire map comprises the Air Force Base at its completion,—that is where it goes, just the other side of Rosamond Lake—would you say the center of the proposed property, not the actual Air Force Base but the proposed property, would be about this location (indicating)? Would you like to count those square miles and determine that?

A. The cross you have marked is approximately the center of the map.

Q. Then on the existing Air Force Base as it exists now, the County Road runs up here (indicating); would this (indicating) be the approxi-

(Testimony of DeWolfe H. Miller.)

mate center of Edwards Air Force Base at this time?

Mr. Weymann: Objected to, same question under another guise, as irrelevant and immaterial.

Miss Barnes: This is a different question.

Mr. Weymann: It calls for the same answer.

Miss Barnes: Read the last question and answer, and read this question.

The Court: Mrs. Buck, read the last question [154] and answer, and the pending question.

(The record was read.)

The Court: That is the green cross?

Miss Barnes: Yes.

The Court: Any objection?

Mr. Weymann: Read it. I made the objection.

(The objection was read.)

The Court: The objection is overruled.

The Witness: Assuming that this is the present west boundary (indicating),—

The Court: What is the answer?

The Witness: Assuming that this line is the present west boundary,—

The Court: How is that designated on the map?

The Witness: "Military Reservation approximate."

The Court: All right, go ahead with your assumption.

The Witness: —the green cross would be near the center of that property.

Q. (By Miss Barnes): Will you please, Colonel Miller, authenticate this map by the—

Testimony of DeWolfe H. Miller.)

A. This is a map reprinted from military edition for civil use pending revision for standard issue. Sold and distributed by the U. S. Geological Survey.

Miss Barnes: I would like to offer this map to evidence, your Honor. [155]

Mr. Weymann: Objected to. No competent foundation laid, and being irrelevant and entirely immaterial to any of the issues before the Court at this time, which is the question of the good faith of the Secretary of the Air Force in determining as to the acquisition of the subject property here necessary for the purposes of the Flight Test Center at Edwards Air Base.

The Court: The objection is sustained. Let it be marked for identification as Pancho Barnes Exhibit No. 7.

(The map referred to was marked as the Pancho Barnes exhibit No. 7 for identification.)

Miss Barnes: Could we compare and refer to this map as against the maps that are already in evidence?

The Court: Well, that will be a question that the Court will have to decide when it comes up, Miss Barnes. It is marked for identification, and the Clerk will have it in his own possession.

Miss Barnes: I could do that with this witness, if you wish.

The Court: If it would serve any purpose, you may do it now.

(Testimony of DeWolfe H. Miller.)

Miss Barnes: I would like to ask this witness, because of his position and his business, could he tell us when this runway will be completed, this proposed runway. [156]

The Witness: I believe the contemplated completion date is December next year.

The initial paving is to start in about 30 days.

Q. (By Miss Barnes): That includes moving the buildings where this green mark is, and other buildings?

A. Yes. The buildings to the south of the new runway will be razed out of existence, and we will move generally other construction which is being accomplished north of the new runway.

Q. Colonel Miller, are you familiar with the plans of the Air Base, the future plans of the Air Base? A. In general.

Q. Here on this map it shows that this line out around here (indicating) is Military Reservation. It goes on out there, and it comes down here (indicating). Would you say that is the approximate location of the Wherry Housing?

A. I would say it is the approximate location, yes.

Q. Do you know how many homes are there in the Wherry Housing, approximately?

A. I believe there are 1,050.

The Court: Where are they located?

Miss Barnes: In this area, your Honor (indicating).

(Testimony of DeWolfe H. Miller.)

Q. Approximately how many people live in that area, including the children? [157]

A. Somewhere in the neighborhood, I would imagine, between four and five thousand.

Q. Are there public schools in this area?

A. They are under construction.

Q. Where do the children go to school now?

Mr. Weymann: Objected to, immaterial.

The Court: What is the materiality of that? Just don't answer that. It is immaterial.

Q. (By Miss Barnes): Are you familiar with the runways laid out on the dry lake?

A. I am to a general degree.

Q. There is a north and south runway that isn't marked on this map. These other two runways, are they approximately as marked on this map?

A. I am familiar with the north-south; I am not too familiar with the two you have shown on your exhibit.

Q. Could you roughly mark here the north-south runway?

A. I believe it extends generally from the railroad tracks south.

Q. Could you mark that on the map, sir?

A. Somewhere in this general neighborhood (indicating).

Q. How far south does it go?

A. I would say probably pretty close to the [158] full length of the lake. We are trying to take maximum advantage of that surface.

(Testimony of DeWolfe H. Miller.)

The Court: Is that brown area the lake?

The Witness: Yes, sir. This (indicating) is the flat portion of the lake.

Q. (By Miss Barnes): Have you seen the east-west runway here on the south of the lake recently?

A. No, I have not.

Q. Would you say that that (indicating) appears to be the direction in which it goes?

A. I can not answer that question.

Q. Colonel Miller, is that (indicating) the railroad that crosses the dry lake?

A. I believe that is the old route.

Q. Is that railroad still in use?

A. It is as of this date, and the new track re-locating it is essentially completed.

Q. When will the new railroad be in operation?

A. The last date we had on that, I believe, is December of this year.

Q. Is it not true, Colonel Miller, that the mud mines are still working this portion of the lake (indicating)?

Mr. Weymann: Objected to, irrelevant, immaterial.

The Court: What is the materiality of it? [159]

Miss Barnes: Well, your Honor, as you realize, the Air Force is trying to get rid of us. They said they wanted to throw us out in 30 days and, at the most, 60. There is no reason they should do so, when other people are allowed to go on and do things. Right where they are testing in that lake, mud mines are still operating. I think it is pertinent.

(Testimony of DeWolfe H. Miller.)

Why should we be discriminated against in such a manner? It is simply a part of the bad faith that is throughout this entire thing.

The Court: What would you say is the distance from where Mr. Meyers is working to the north-easterly edge of the runway?

The Witness: Of the new runway, sir.

The Court: Yes.

Q. (By Miss Barnes): The new runway isn't in use at all? A. No.

Miss Barnes: There is another runway here.

The Court: I am talking about the one in green.

The Witness: Approximately two and one half miles.

The Court: Whom does he represent, Bud Meyers? You may answer that question.

The Witness: I think, sir, she is referring to the mud mines which have been in operation on Muroc Dry Lake for a large number of years. [160]

It is my understanding at the present time that the operation is being carried on there to clean up the pits preparatory to back fill.

The Court: You mentioned someone's name, I think, that was working there.

Miss Barnes: No, I just mentioned "mud mines." They take clay out of there, earth, for various uses.

The Court: Oh, I understand. The objection is sustained.

Q. (By Miss Barnes): How long will it take,

(Testimony of DeWolfe H. Miller.)

Colonel Miller, to remove the railroad and refill these mud mines, before this runway (indicating) could be used?

A. The railroad track will probably be removed within the present year. The mud mines will probably be back filled in somewhat near the same time. You can operate from that runway, if you had to and wished to take a calculated risk.

Q. When you say "the present year", you mean within the next month or so?

A. I am sorry; I mean—somewhere in the end of 1954.

Miss Barnes: I think that is all.

Redirect Examination

Q. (By Mr. Weymann): Colonel Miller, you were asked, on cross examination by Miss Barnes, regarding the certain buildings located within the area of the clear way. [161]

Do you know the calculated useful life of those buildings at the time they were constructed?

A. The bulk of the buildings were referred to as theater of operation type, and were designed for a useful life expectancy of five years.

There were a few buildings what were referred to as immobilization type, designed for a life expectancy of ten years. [162]

* * * * *

Recross Examination

Miss Barnes: I would like to ask Colonel Miller

(Testimony of DeWolfe H. Miller.)

about the two big hangars on the Base, the gigantic hangars there.

Q. Will you please explain to his Honor about them.

A. The two large hangars, which you refer to, are to be moved to the new Base.

Q. Will you state the size of those hangars?

The Court: Well, is that material, as long as they are to be moved?

Miss Barnes: Well, he testified they weren't permanent structures. The hangars, with many other things, your Honor, were permanent structures on the Base, and they were set there——

The Court: He says they are to be moved as part of this operation.

That is correct, isn't it?

The Witness: That is correct.

Miss Barnes: That is all.

Mr. Weymann: No further questions, your Honor.

The Court: You may stand aside.

(Witness excused.) [163]

* * * * *

The Court: Well, the Court sustained the motion to strike on the basis his testimony was immaterial, and the order may still stand.

You may call your next witness.

Miss Barnes: Well, we have Colonel Akers on the stand, your Honor, from the other day.

The Court: Colonel Akers may resume the stand.

The Clerk: You have been sworn.

MARION J. AKERS

a witness called by the Defendants under Section 43(b), having been previously sworn, was examined and testified further as follows:

Miss Barnes: May we refer, your Honor, to the exhibits of the three maps which we had in court the other day here?

The Court: Yes, you may. [166]

Examination—(Continued)

* * * * *

Q. (By Miss Barnes): Colonel Akers, in looking at this map in front of you now, which is labeled "Enclosure No. 1", would you say—what does this yellow spot indicate? [167]

A. The yellow spot indicates the Barnes and McKendry property, as indicated on the map.

Q. Would you say that was in the center of even—well, would you say that was in the center of the area that is shown there?

A. What area are you referring to?

Q. That which is in blue, or green, whatever it is, the color of the map.

A. No, I would say it is not in the center of the area as shown in green on this particular map.

* * * * *

The Witness: I can count the number of runways indicated on the map in front of me labeled "Enclosure No. 2", if the Court desires.

The Court: Well, you heard the question, Colonel.

The Witness: I would say there are eight.

Q. (By Miss Barnes): Do each of those run-

(Testimony of Marion J. Akers.)

ways show these paddle-like extensions? I don't know what they call them; there is an extension on the map.

A. Would you mind showing me what you are referring to?

The Court: Will you talk a little louder, please. You are standing so close to the witness, Miss Barnes, the two of you regulate your voices to reach each other.

The Witness: I would like to know what she indicates as "paddle-like extensions."

Q. (By Miss Barnes): These paddle extensions to the runway. The runway runs so far, then you show an extension.

Do each and every one of those runways show that extension? [170] In other words, is this (indicating) an extension of that runway? This happens to be colored red, but you also show other extensions there.

Each one of the runways I counted has the so-called paddle extension, as you refer to it.

Q. On both ends of it?

A. At a hasty glance I would say yes.

Q. In referring to the transcript of September 9th, Colonel Akers,—I want you to look at this right with me—under questioning by Mr. Weymann, will you read your answer?

I will ask the question:

"Now, with reference to Enclosure No. 2, what does that purport to show?"

(Testimony of Marion J. Akers.)

Will you read your answer? You may read it out loud.

The Court: What page is that?

Miss Barnes: That is on page 16 of the transcript of September 9th; starting at line 17 of page 16. [171]

* * * * *

Friday, October 30, 1953, 2:00 p.m.

MARION J. AKERS

the witness on the stand at the time of the adjournment, resumed the stand for further examination and testified as follows:

Examination—(Continued)

The Court: Mrs. Buck, read the last question.

(The record was read as follows: “Q. Starting at your answer there, will you read that, Colonel Akers?”)

Q. (By Miss Barnes): Page 16. Will you read the answer?

A. “Enclosure No. 2 — may I borrow a pencil, please — again shows the new runway, the master test runway, in this location coming out here (indicating), with a flight path. It shows the existing runway presently in use, which is this runway coming out in this direction (indicating).

Miss Barnes: Read on.

The Witness: (Reading)

“The Court: That is the upper read mark?

“The Witness: That is the flight zone. This (in-

(Testimony of Marion J. Akers.)

dicating) is the runway itself, which ends here and here (indicating). The airplanes taking off to the southwest fly in this general area on take-off, auxiliary [173] to climbing speed and so on. Approaching for landing the other way, they come in in this direction (indicating).

“The Court: What is the other?

“The Witness: This runway”——

The Court: Has he read enough?

Miss Barnes: That is fine. That is all I want.

Q. I have one other thing, Colonel Akers. I would like you to take I think it is Enclosure No.—Colonel Akers, this (indicating) is Enclosure No. 2. I have very carefully, several of us working on it, scaled it as correctly as we could, and have drawn this runway on our big map, have drawn this particular runway (indicating) on our big map, the Engineers’ or Geodetic map in court.

I would like you to compare that runway as drawn there with the Geodetic runway of the government, to see if it is accurately placed. Will you do that, please?

Mr. Weymann: What is the purpose of that?

Miss Barnes: Mr. Weymann, the purpose is this: There has been a great deal to do with these paddles coming on, converging across my property. I feel I can prove those paddles not only don’t converge on my property, but this runway converges over the Wherry Housing, where the Colonel testified there were four or five thousand people.

In other words, what I am trying to show, if the

(Testimony of Marion J. Akers.)

charge is true, and you are interested in the life of people, this [174] is the pattern for this runway, and these are patterns you have converging across the defendants' property; and it is only fair if these patterns going across the defendants' property are dangerous to the defendants and their life and limb, this is equally dangerous to the four or five thousand people living in the Wherry Housing.

As Colonel Miller indicated on the other map, that (indicating) is the approximate location. This comes into that (indicating), and the school children and other people.

I think it is only fair to show the Judge the same condition holds even more potently responsible over the lives of these thousands of people and children as it does over our ranch, if those paddles actually extend to those.

Our map shows if these paddles extend out north of them, touch our ranch,—

Mr. Weymann: Why not ask the witness?

Miss Barnes: I have asked him. The Judge has the picture of it.

The Witness: Your Honor, so as to speed things up, I can answer the question very simply.

The Court: You know what the question is. Just answer.

The Witness: I feel I understand the question.

That is, to the effect of the extension of this flight pattern coming from the lake bed across Wherry Housing.

The Court: I think you better designate it.

(Testimony of Marion J. Akers.)

The Witness: It is the lake bed runway shown in Enclosure No. 2, the northwest portion of Rogers Lake.

The Court: That is Exhibit No. 3, Enclosure No. 2.

The Witness: The answer to the question is simply this, your Honor: Aircraft or other flying vehicles do not take off on this runway (indicating) in the direction of the Housing area. That is prohibited. So there is no flying from that runway across the Housing area.

The Court: All the taking off is to the northeast?

The Witness: Yes. On that runway. Take-offs are limited to the northeast, because of the Housing area.

Q. (By Miss Barnes): Why did you show that pattern, then, on this map, Colonel Akers?

A. It may have been an oversight. It is normal, in showing a runway, to show the approach zones to it, in a drawing.

Miss Barnes: Would you have an objection, Mr. Weymann, to letting me show the Judge the big map as to the way the flight pattern goes, with respect to the way it goes over ours, when it is in proportion? It has been testified this map is not exact. We have a map that is exact.

The Witness: May I make a statement?

The Court: Mr. Weymann has a question to answer.

Mr. Weymann: I haven't any objection, your

(Testimony of Marion J. Akers.)

Honor, but I [176] don't see that the map would expand the answer given by the Colonel. I am simply trying to save time.

The Court: Well, we are trying to save time.

Miss Barnes: I think it is very important, your Honor, because——

The Court: The Court can see the paddle as designated on that map; but the ground rules prevent any take-off in a southwesterly direction.

Miss Barnes: I would like your Honor to see our map now on which we have very carefully drawn these paddles, so to speak, in proper scale. This (indicating) is not to scale, if your Honor please. They so testified themselves.

The Court: I want to know, is that approximately correct?

The Witness: That is approximately correct, your Honor.

The Court: It seems to me that question could be well answered by that statement that that is approximately correct, but the ground rules say that the take-off must be in a northeasterly direction; so just pass that, Miss Barnes.

Miss Barnes: Let that one go. All right, I am through with the Colonel, then.

Mr. Weymann: At this time, if the Court please, I would like to offer as Plaintiff's Exhibits those three documents—I think they are marked Defendants' Exhibits 2, 3 and 4 for identification. I would like to offer those now as Plaintiff's Exhibits. [177]

(Testimony of Marion J. Akers.)

The Court: Well, which ones are they, Mr. Weymann?

Mr. Weymann: The Enclosures 1, 2 and 3.

The Court: They are marked for identification.

Mr. Weymann: They are marked for identification.

The Court: Well, the Court will permit them to be marked as Joint Exhibits Nos. 2, 3 and 4.

Mr. Weymann: That is satisfactory, your Honor.

Miss Barnes: Yes, indeed, your Honor.

(The documents heretofore marked Pancho Barnes' Exhibits 2, 3 and 4, were received in evidence as Joint Exhibits 2, 3 and 4.)

Mr. Weymann: Now, may I have those, after they are marked. While the Clerk is marking them, I think I can resume the examination.

Redirect Examination

Q. (By Mr. Weymann): Colonel Akers, some question was raised as to whether or not those exhibits were the identical plans, the identical maps, which you referred to in your examination of September 9th, and whether they are the same maps unaltered and unchanged.

Miss Barnes: Your Honor,—

The Court: I think he has answered that.

Miss Barnes: He has answered that, your Honor. I am not trying to make any issue or impeach anyone. All I want to do is get at the truth of the matter. As far as I am [178] concerned, I am not making any contest on those maps. [179]

* * * * *

(Testimony of Marion J. Akers.)

Miss Barnes: Now,—

Mr. Weymann: Just a moment. I am examining the witness.

Q. Could you indicate on Enclosure No. 2 approximately where that landed?

A. It landed in this general area here (indicating), as indicated by the pink.

The Court: Mark it with an "A" there.

Miss Barnes: Mr. Weymann, was that an airplane he is referring to?

Q. (By Mr. Weymann): Will you answer the question, Colonel?

A. It was an aircraft, an experimental aircraft, that had difficulty in flight.

Miss Barnes: Were there lives lost?

The Court: You may cross examine later.

The Witness: There were no lives lost in this case.

Q. (By Mr. Weymann): Was there any property damage?

A. I can't answer that question. As yet I haven't had time to determine the extent of damage to property.

Q. Now, Colonel, based on your knowledge and experience of the operations in that Test Center, are you of the opinion that there is a hazard and a danger to life and limb, and danger to property within the main runway clearway, as delineated on Enclosure No. 2? [182]

A. That is correct. I feel there is, not only

(Testimony of Marion J. Akers.)

within that area, but within the area described on the said exhibit, generally within the area defined as the boundary or ultimate boundary of the installation.

That is one of the prime reasons that the Air Force has seen fit to approve the expansion of the Test Center and Congress has also seen fit to approve it and appropriate funds for the acquisition of the property. One of the reasons for it is safety.

The Court: Colonel, will you sit back a little and hold the map in your hand. It would be much easier for me to see it.

The Witness: In the conduct of our mission at the Center, our primary mission is to conduct the flight tests on the new aircraft that will in the years to come—say three, five or seven years from now—be the bulwark of our defense and offense of the Air Force for protection of the country.

The aircraft tested today may not, probably, get into the hands of the using agency for some three to five years. Consequently, there is danger involved on these flight tests; and in order to have the least amount of damage done to persons, to private property, to industry and other enterprises, it is deemed necessary to have the area outlined here as a general area in which to operate, from the standpoint of safety. We feel that ultimately it will save the government [183] much money, because of the accidents or damage that might occur to the ground or the property there, and loss of life, had it been built up by individuals, and so on.

(Testimony of Marion J. Akers.)

The Court: Well, the Court is interested in the lives, as well as the money.

The Witness: Naturally we are interested in loss of life also, your Honor.

The Court: Let me ask you: You have explained—Hold it over so Miss Barnes can see it.

Miss Barnes: I know it. I memorized this, too.

The Court: You explained to the Court these two loops. Explain it again.

The Witness: This straight line through here (indicating) is the course flown by aircraft undergoing speed tests, any altitude. These dumb-bells or loops on the end are turn-around points. The aircraft flies one direction, turns around, and flies back the other direction.

The Court: As delineated on the map, what is the distance approximately between the two loops?

The Witness: The distance between the two loops, your Honor, would be in the neighborhood of 18 miles, I would say, statute miles.

The Court: And where is the work being done now, on this map?

The Witness: You mean the construction work?

The Court: Yes, whatever work is being done for the purpose of completing this runway and this system that you have in mind. Where is the work being done now?

The Witness: The construction work in general is being done in this area (indicating) on the runway. Around up here on the taxi-way ramp area;

(Testimony of Marion J. Akers.)

and the building area, roads, and so forth, up here (indicating), there is construction work.

The Court: And how far would that be from Miss Barnes' property?

The Witness: Offhand, I would estimate it would be in the neighborhood of three miles, statute.

The Court: Now, is there any degree of reasonable likelihood that with the work being done here (indicating), three miles away from her property, that her property or anyone there would be injured?

The Witness: Yes, sir. The likelihood exists, because the aircraft are flying over this area every day.

Miss Barnes: I think he didn't understand the question there, your Honor. I was confused. Were you asking about the work to the runway itself?

The Court: No. I think I will have Mrs. Buck read the question.

(The record was read as follows: "Now, is there any degree of reasonable likelihood, with the work being done here, three miles away from her property, that her property [185] or anyone there would be injured?")

The Court: Do you understand the question?

Miss Barnes: Well, it is all out of kilter. We will get it straight on cross examination.

The Court: All right.

Do you understand it?

The Witness: I am not sure, your Honor, but let me answer it this way: The work with respect to

(Testimony of Marion J. Akers.)

constructing the runway itself, that is, the building of runways or buildings, that is not the work that endangers her property or anyone else's property.

The Court: That is what I want to know.

The Witness: It is the flying of aircraft, the testing of aircraft.

The Court: What I want to find out is the necessity for the immediate possession of the property; and I am trying to determine whether there is any likelihood that there would be injury resulting if it isn't ordered now, or whether it should be ordered at a later time.

The Witness: That is a difficult question to answer, your Honor. I think we went into something like that before.

Naturally we do not want accidents to happen, but our mission, our job, is to test these new airplanes and find out what is wrong with them. In the course of testing, the accidents do occur, may occur at any time in flight, take-off [186] or landing. It may be over the property or somewhere else.

There is that danger of accidents happening at any time, on the property or anywhere else.

The Court: Let me say that I am now referring to Exhibit No. 4 and Enclosure No. 3. Here is the runway, in a northeasterly direction, from B to A.

The Witness: That is the runway being built.

The Court: Being built?

The Witness: That is not the runway in use at the present time.

The Court: Where is the one in use?

(Testimony of Marion J. Akers.)

The Witness: This one right here (indicating), your Honor, indicated by the dark line.

The Court: This one from B to A is the one being built for future use?

The Witness: That is correct, sir.

The Court: Has there been any work done on that runway yet?

The Witness: Yes, sir. The work on that runway is, I would say, approximately 20 to 25 per cent completed.

The Court: What is the distance between the yellow of Miss Barnes' property and the southeasterly place marked "B" of the runway which is being now worked on?

The Witness: I would judge it to be in the neighborhood of two or three miles, your Honor.

The Court: When do you expect to do work from "B" to Miss Barnes' property?

The Witness: Would you mind saying——

The Court: I will ask you what kind of work do you expect to do there?

The Witness: The only work with respect to construction will be the removal of obstructions to flight.

The Court: There will be no runway?

The Witness: That is correct. It is not planned to build a runway across there. In the two-mile clear zone, obstructions to flight will be removed so aircraft can land, if necessary, wheels up, doing a minimum amount of damage; in other words, so

(Testimony of Marion J. Akers.)

they don't run into a telephone pole, ditch or something like that.

The Court: You expect to have jet planes flying there?

The Witness: Yes, sir; not only jet planes, but other flights. [188]

* * * * *

Recross Examination

Q. (By Miss Barnes): You mentioned three aircraft accidents. When did these three aircraft accidents occur? I mean fatal crashes, not some little thing flying off an airplane; three fatal crashes.

A. I didn't refer to three fatal crashes.

Q. No, but I did. Have there been three fatal crashes in the last three or four weeks, from Muroc?

A. No, there have not been three fatal crashes in the last three or four weeks. There have been two fatal crashes. The one I refer to on Tuesday, in which approximately one and one-half tons of material came floating off of the aircraft, they did have trouble in flight. The pilot was able to get the plane back home safely, and did not lose his life. However, there was approximately a ton and a half of metal floating down.

Q. We heard you. That wasn't the question.

Tell me about the fatal accident that occurred just north of the Base, the military reservation, just north of the public highway from the military reservation just recently, where two North Amer-

(Testimony of Marion J. Akers.)

ican—two Molthrop pilots were rolling the airplane over the hangar.

A. I assume you are referring to an accident that happened, as I recall the date, the 20th of October, involving [190] an F-89,—

The Court: This October?

The Witness: This October, 1953, involving a jet aircraft, in which two persons were killed.

Q. (By Miss Barnes): Did that airplane crash on the Base?

A. It did not. It crashed off the reservation, and, for the information of the Court, parts of that aircraft landed in the front yard of a very isolated ranch.

Q. Approximately, from that map, where did that crash land?

A. It occurred in this general area here (indicating).

Q. All right. Now—

The Court: That is in the upper part of the paddle north of the heavy black line, as shown on Exhibit 3, Enclosure 2?

The Witness: Yes, sir.

Q. (By Miss Barnes): All right, Colonel Akers, where did Major Popson spin in with the experimental aircraft? About when did that accident—or where did he spin in, in what location?

A. I don't recall the exact date. I assume you are referring to an accident in which Major Popson, one of the test pilots, was killed in an experi-

(Testimony of Marion J. Akers.)

mental aircraft, and he was killed in an area east of the Base. [191]

Q. Is it not true he was killed off of the reservation?

A. It is not true he was killed off of the reservation. He was killed east, as I indicated.

Q. On the reservation?

A. On the reservation.

Q. There was a third accident where, I believe, the pilot bailed out, took off from the Air Base?

The Court: Just mark Popson there.

The Witness: The area would be very general, your Honor.

Q. (By Miss Barnes): Colonel Akers, was there another aircraft from the Air Base lost within the same short period of time?

A. Not to my knowledge.

Q. An aircraft crashed over near Victorville, and the pilot bailed out?

A. Is that a question?

Q. Yes, I am asking you.

A. I assume you are referring to the same article I read in the paper in which there was a pilot from the Georgia Base.

Q. Anyway, we will let that go.

You confine your test flights to the military reservation?

A. No, it is impossible to confine test flights to the boundary of the military reservation.

Q. Is it true, then, Colonel Akers, that as long as you [192] don't confine these test flights to the

(Testimony of Marion J. Akers.)

reservation, that anything that went wrong with them could go wrong with them at any place they may happen to be flying; is that correct?

A. It is a possibility, yes.

Q. In other words, if a huge chunk of metal were apt to fly off, it could have flown off anywhere, off or on the reservation, or many, many miles from there; is that correct?

A. Not entirely, no.

Q. Why not?

A. Normally the troubles that develop generally develop within a relatively short period of time after take-off or during a descent for landing, or during a certain portion of the test which might tax the engine or air frame parts, or something like that; and if that is the case, it is in the vicinity of the reservation.

Q. This airplane that you said lost this huge piece of metal, did it land safely back on its place of take-off?

A. It landed on the lake bed.

Q. It landed on the lake bed, and it was safe?

A. Yes.

Q. These all-altitude courses, as you all call them, why aren't they confined to the bases instead of going over the town of Rosamond?

A. I don't recall now testifying these were hazardous. This is an all-altitude speed course, flown back and forth [193] to check their speed.

Q. In other words, you don't consider that a hazardous endeavor?

A. Some parts may be, some parts not.

(Testimony of Marion J. Akers.)

Q. But safe enough to go over the town of Rosamond?

A. The flight path doesn't carry them over the town of Rosamond.

The Court: Where is the town of Rosamond?

The Witness: Inside this loop here (indicating). Shall I mark that?

The Court: No, there is no need to.

Miss Barnes: I think that is all.

Mr. Weymann: I have some cross examination.

The Court: Mr. Weymann, I would like to ask one question.

Looking at exhibit 3, Enclosure 2, I think you said about 18 miles from here to here (indicating), one loop to the other, is that correct?

The Witness: Yes, I estimated that would be in the neighborhood of 18 miles.

The Court: It is your statement that this——

Miss Barnes: Are you looking for the one that is going over the Wherry Housing, your Honor?

The Court: No, I am trying to get the distance in mind. [194]

* * * * *

Examination * * * * *

Q. (By Mr. Weymann): Colonel Akers, do you know if it is possible or feasible to take photographs of the classified configurations of new aircraft from the premises occupied by the defendant?

The Court: Read that question.

(The question was read.)

The Court: You may answer it.

(Testimony of Marion J. Akers.)

The Witness: Yes, it is possible to do so.

Q. (By Mr. Weymann): And that would constitute a security leak, would it not?

A. Well, the danger is not so much in the security leak. It depends on who takes the pictures, and what they do with them. We are testing, as I mentioned before, aircraft of the future, and it behooves the defense of the country to keep their configurations, in many cases, and performance, and so on, secret and away from anyone who might want to use them for adverse purposes.

Q. And would the operation of a commercial flying field within the area of the Base constitute any hazard to flying safety in view of the tests being carried on? A. It would, definitely.

Mr. Weymann: That is all, Colonel.

Miss Barnes: I think I will have to ask the Colonel a question on that. [201]

Cross Examination

Q. (By Miss Barnes): If you could take photographs from the defendants' property, wouldn't it be even more convenient to drive over on the highway running just at the west boundary of the Base, which is a public highway, and take your pictures, Colonel?

A. That is possible. However, the law enforcement officials can control the people on the highway.

Q. What law enforcement officials?

A. I would assume the Sheriff, the County

(Testimony of Marion J. Akers.)

Highway Patrol, and other law enforcement officers who would have authority there.

Q. Would you be referring, for instance to the head of the Sheriff's Office at Mojave, who testified here?

A. I was not. I was not referring to anyone in particular.

Q. Regarding small aircraft flying around, isn't it true there are civilian aircraft that land on that Base?

A. That is true. They have a definite route to follow to land there. They are under the control of the control tower at the Air Base and directions are given to them by the air control tower, so they are under direct control.

Q. Have you ever heard, since the time you have been there or before you were there, that aircraft from the defendants' field have in any way jeopardized aircraft from [202] the Air Base?

A. It depends——

Miss Barnes: Say "yes" or "no", for once.

The Court: Let him answer as he desires. You can move to strike it out.

The Witness: It would depend on how your term "jeopardized" is defined.

The Court: "Jeopardized" has a well-known meaning.

Have you any further questions?

Q. (By Miss Barnes): Have the aircraft ever offered to coordinate traffic control with the defendants? A. I couldn't——

(Testimony of Marion J. Akers.)

Mr. Weymann: Objected to as being immaterial and irrelevant.

The Court: The objection is sustained.

Miss Barnes: That is all.

The Court: Colonel, there is one question I want to ask. Can you point out on this Enclosure No. 1, Exhibit 2, just about where those mud mines are that are being worked on?

The Witness: One qualification, your Honor: The mud mines are not being worked now. Operation of those mud mines has been stopped some time ago.

They are located in this general area in here (indicating). [203]

The Court: Well, I got the impression from the testimony this morning that they were now being worked, the mud mines were being worked. You say that they are not being worked?

The Witness: Mining operations have ceased as of some time ago. The work being done there now is the process of filling them back up again.

The Court: Is this mud used in rotary pumps for oil drilling?

The Witness: Yes, your Honor. [204]

* * * * *

Miss Barnes: I want to call Chief Hemsley.

ELLIS E. HEMSLEY

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows: [206]

The Clerk: State your full name.

The Witness: Ellis E. Hemsley, H-e-m-s-l-e-y.

The Clerk: Have that seat.

Direct Examination

Q. (By Miss Barnes): What is your name, Sir? A. Ellis E. Hemsley.

Q. Your address?

A. Star Route, Box 20, Blythe, California.

Q. Your present profession?

A. I am an operator of a sportsmen's camp, fishing and hunting.

Q. How long have you been operating that camp? A. Since May 1, 1953.

Q. Before you operated that fishing camp, what was your profession?

A. I was Fire Chief at Edwards Air Force Base.

Q. How many years were you Fire Chief at Edwards Air Force Base?

A. From 16 August, 1944, to April 30, 1953.

Q. During the time that you were Fire Chief, did you attend all the aircraft crashes?

A. No.

Q. Why not?

A. Well, there were times when I was on annual leave [207] or business trips, where crashes could have occurred when I was not on the Base.

(Testimony of Ellis E. Hemsley.)

Q. If you were on the Base when they occurred, did you attend them? A. Yes, ma'am.

Q. I want to call your attention to this joint exhibit here—I believe it is defendants' No. 4—do you recognize what this map purports to show? In other words, does that look like the more or less outline of the Rogers Lake, to you?

The Court: Miss Barnes, that is such a small map I have to lean forward to see it.

Miss Barnes: I am sorry.

The Witness: Would you repeat the question, Miss Barnes?

Q. (By Miss Barnes): Would you recognize that, about what that map purports to show? Could that be, for instance, Rogers Dry Lake there (indicating), and this (indicating) Rosamond Dry Lake?

A. Yes, ma'am.

Q. Now, you will notice on this map there is a green legend down here, and that legend states: "Actual crash locations". A. Yes. [208]

Q. That means those little green dots. Now, Colonel Akers testified on the stand that these were the exact locations of nine crashes that occurred on Rogers Dry Lake. Do you agree that these marks indicate such crashes?

A. I do not.

Q. Why not? Why do you differ with that?

A. Well, I would have to ask a question, if it is permissible. Over what period of time are these crashes supposed to have occurred in this area?

Q. Colonel Akers testified from 1949 to 1952, I believe.

(Testimony of Ellis E. Hemsley.)

A. Then my answer to your last question is that there were not nine crashes in this area as shown on the exhibit, during that period of time.

Q. Were there any crashes that occurred in that area? A. Yes.

Q. Could you explain them?

The Court: Well, can you point them out?

Q. (By Miss Barnes): Could you point them out and explain what they were?

A. Well, there were three crashes that could possibly be indicated by these green marks shown, such as this one (indicating), a bit off location. I take it that this (indicating) is the present runway at Edwards Air Force Base?

Miss Barnes: I believe that is correct.

The Court: Now, which is the present runway?

The Witness: This black line?

Miss Barnes: Yes, that has been testified to, that is the present runway. Not the projected, new one, but the present.

The Witness: This (indicating) would be in close proximity to one crash.

The Court: The dot in the upper right-hand corner?

The Witness: That is correct.

Any of these three (indicating) would be in very close proximity to another, and this one (indicating) could indicate the third crash.

Q. (By Miss Barnes): Were any of those crashes fatal crashes? A. Yes.

Q. Which one? The name of the man flying, not the airplane?

(Testimony of Ellis E. Hemsley.)

A. The crash that occurred in this area (indicating), Naval Commander Wood, who lost his life in the crash.

Q. How did that crash occur? Was it on take-off or landing? Will you explain how that crash occurred?

A. No, it was not take-off or landing. The aircraft was in flight, as we call it, making a pass over the lakes. Exactly what happened to the aircraft to cause it to crash I can't say; but we were standing by with our crash trucks, along the west boundary of the runway. He was to pass in [210] front of us. When he got approximately two miles from us, he went on into the lake, crashed into the lake.

Q. Are you quite positive, Chief, that there were no more than three crashes, as you stated, and only one of them was fatal?

The Court: I think he has named five.

The Witness: No, your Honor, I am afraid you didn't understand me. I said any of these three could indicate a crash that occurred in this area (indicating).

The Court: Just one of them?

The Witness: One of them would, yes; and the three would be down here (indicating).

The Court: Now answer Miss Barnes' question.

(The pending question was read.)

The Witness: That is correct.

Q. (By Miss Barnes): Was one of those crashes a taxiing accident that you referred to?

(Testimony of Ellis E. Hemsley.)

A. Yes, the accident that occurred in this area (indicating) was simply a taxi run accident. The aircraft was not intended to be in flight.

Q. Chief Hemsley, Colonel Akers testified that an accident can happen anywhere. Do you agree with that? A. Yes.

Q. I am going to ask you the names of certain pilots [211] who we knew, and I want you to tell about where they crashed.

I am going to mention Joe Wolfe. Did you see that accident?

A. Yes, I was looking at the aircraft at the time of the accident.

Q. That map is a little small to indicate. Will you please tell approximately where that aircraft crashed?

A. I am a bit confused. I don't know whether I can, Miss Barnes. If you could show me the area where the present Wherry Housing sets, I could give you a fairly definite location of where the aircraft crashed into the ground.

Q. Instead of bothering with locating it exactly on the map, how close—

A. I can tell you this, its impact to the ground was approximately one and one-half miles south-east of our Wherry houses.

Q. Where did Captain Bailey crash?

A. Captain Bailey crashed on the side of a desert butte approximately 25 air miles southeast of the reservation.

Q. Do you remember George Krebs?

(Testimony of Ellis E. Hemsley.)

A. I don't believe I place George Krebbs, with an accident, that is.

Q. He was killed in an accident from the Air Base, but it was a considerable distance. I wonder if you can remember that. [212]

A. I don't recall the accident.

Q. Pete Sellers?

A. Captain Sellers' accident occurred approximately 35 miles southeast on Mirage Lake.

Q. Edwards Air Force Base was named after Glenn Edwards, and his life was lost in a test flight. Can you tell approximately where he crashed?

A. Yes. That crash was 7 miles north and 8 miles west by highway from the main base at Edwards. I may pinpoint that a little more specifically. That was just north of Highway 466.

Q. Where was it in relation to the town of Mojave?

A. I would say it was approximately 15 miles east of Mojave.

Q. And off the reservation?

A. Off the reservation.

Q. Do you know approximately—Bob Hoover bailed out of his ship and let it go, I think. Do you know that Bob Hoover did bail out of his ship?

A. Yes. I heard of the incident later, but I believe I was away at the time and the crash was not fatal. I did not pay too much attention to the reports that were made by my assistant chiefs.

(Testimony of Ellis E. Hemsley.)

Q. Did the aircraft land on or near the reservation?

A. As I recall, it was a considerable distance from the [213] reservation.

Q. Neil Lathrop lost his life in a crash. Did you see that, Chief?

A. I was looking at that aircraft.

Q. Will you explain how that accident happened, Chief, and where he crashed?

A. Well, to explain how it happened, I can tell you what I saw. Major Lathrop had made several passes over the main base runway. We were watching him quite closely, and, on this final pass, he evidently attempted what we call a slow roll, lost control of the aircraft, and went into the ground approximately one-eighth of a mile west of our main runway on the main base.

Q. Was he practicing for an airshow, or was that test work?

A. I can't answer that.

The Court: Don't take the time with that.

Miss Barnes: Okay.

Q. Earlier in the case I testified as to several years at Muroc, and I mentioned incendiary fires there. How many incendiary fires, Chief, did you have on that base, approximately?

A. I would only be able to give an approximate estimate but I would place it between 12 and 15.

Q. Incendiary fires. Was the Officers' Club one of [214] these fires?

A. That is correct.

(Testimony of Ellis E. Hemsley.)

Q. Did you report it as an incendiary fire?

A. Well, I endeavored to.

Q. What do you mean when you say you endeavored to?

The Court: Well, I don't think we will take the time to go into that. That would call for the conclusion of the witness.

Miss Barnes: Your Honor, what I am trying to prove in this case, as you know, is bad faith; and I made an allegation the entire change of the base and the runway, which is a very expensive and absurd thing to do, was done by Colonel Gilkey because I interfered in trying to catch the pyromaniac, and I want to show you and make the proof that Colonel Gilkey was doing everything under the sun to keep these fires from being known as incendiaries, and keep me from endeavoring in any way pursuing or capturing this——

The Court: If you can do it in a very short time, you may.

What were you going to say?

Mr. Weymann: I object to the question, because I don't know what that has to do with the exercise of discretion by the Secretary of the Air Force.

The Court: Miss Barnes may have a few minutes.

Miss Barnes: I will get right to the point. [215]

Q. Were you requested to change your report, Chief Hemsley? A. That is correct.

Q. Who requested you to change your report?

A. Lieutenant Colonel Rau.

(Testimony of Ellis E. Hemsley.)

Q. Who was he?

A. He was the Executive Officer to the Base Commander.

Q. Who was the Base Commander?

A. Colonel S. A. Gilkey.

The Court: The Court doesn't see the application of this to the matter before the Court. Proceed with some other matter.

Mr. Weymann: I haven't made any objection to this line of testimony because I didn't want to take the time.

The Court: Let me see those two maps.

(Documents handed to the Court.)

The Court: Did you know a gentleman by the name of Popson?

The Witness: No, I did not know him.

The Court: You did not know him?

The Witness: No sir; that happened since I was at the base.

Miss Barnes: I would like to ask him one other question.

Q. When an aircraft takes off of the air base at Muroc, is it customary to take off into the wind?

A. Yes, ma'am.

Mr. Weymann: Just a moment, please. I don't believe this witness is qualified to answer technical questions. He testified as a fire chief, not an aeronautical expert.

The Court: Well, Mr. Weymann, I don't know whether that would require an expert or not. I should think not. A man who is there all the time

(Testimony of Ellis E. Hemsley.)

and sees them,—whether it is a requirement might be a different thing.

Do they take off into the wind?

The Witness: Yes, sir.

Q. (By Miss Barnes): And what is the direction of the prevailing wind?

A. The direction of the prevailing wind at Edwards Air Force Base?

Q. Yes, sir.

A. Approximately 90 per cent is from the northwest.

Q. Regarding the runway that is up close to the north base, that I was indicating to Colonel Akers, do you know that runway? Do you know of a runway up at the north end of the base?

A. The north base?

Q. Yes. A. Yes.

Q. What direction do they take off there?

I will frame that differently; I will state exactly what [217] I want to know.

Do they take off from that base there, and is the flight path directly over the Wherry Housing?

A. That is correct.

Miss Barnes: That is all.

The Court: Any cross examination? [218]

* * * * *

(Witness excused.)

The Court: Call your next witness.

Miss Barnes: Your Honor, we have quite a few witnesses that I would like to have testify. I

know how busy the Court is, and I know you have got things piled up ahead.

I spoke to Mr. Weymann this morning when I first came in, and asked him if he would stipulate, if it would be agreeable to your Honor, if I could take depositions, and have the transcripts made up to be sent to you on this case for your consideration. That way I can eliminate witnesses here that will hold us up in time.

The Court: Well, we have this case set for trial and you have had to take two days out of the time the Court allotted. I would like to finish with the testimony either today or tomorrow.

Miss Barnes: Then in that case, your Honor, would it be agreeable to you if I took depositions of some of these witnesses with the presence and consent of Mr. Weymann? He so stipulated I could do so this morning. If you want that, then we [221] could put the depositions in the case, and you would have a chance to review them at your leisure.

The Court: How many witnesses do you have?

Miss Barnes: Approximately 16, your Honor.

The Court: Are they all in the court room?

Miss Barnes: Most of them, yes. They have been here, some of them, since the opening day, and some have gone to Los Angeles and returned.

I would like to bring out the most important ones now, more or less out of order possibly, but I thought rather than——

The Court: Well, if you take depositions,——

Miss Barnes: I don't want to lose the chance to

have them testify, your Honor, on account of I am trying to prove bad faith, which I believe I am going to do, and I wouldn't want any little jigsaw piece of testimony that belonged in there and fit into the picture to be neglected. [222]

* * * * *

Mr. Weymann: I have no further witnesses, your Honor.

The Court: What did Miss Barnes say?

(The record was read.)

The Court: And conclude the matter now?

Miss Barnes: If I could still take the depositions on some of the others.

The Court: Well, I wouldn't want to take up the time——

Miss Barnes: I have witnesses that have been waiting several days. I would like to have you hear one especially. I have one that will only take three minutes on the stand, and the other will take a little longer.

The Court: Mr. Weymann, if you have no objection, the Court will hear those witnesses' testimony, and you will take the depositions of the others.

Mr. Weymann: Those two witnesses?

The Court: Yes.

Miss Barnes: Mr. Stubbs. [224]

LUCIEN Q. STUBBS

a witness called on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Lucien Q. Stubbs.

The Clerk: Have a seat, Mr. Stubbs.

Direct Examination

Q. (By Miss Barnes): Your name, Mr. Stubbs?

A. Lucien Q. Stubbs.

The Court: How do you spell the first name?

The Witness: L-u-c-i-e-n Q.

Q. (By Miss Barnes): Your profession?

A. I work for the Government.

Q. Are you connected with the Muroc School District?

A. I am Clerk of the School Board.

Mr. Weymann: I can't hear what the witness is saying.

The Court: Mrs. Buck, read the question and answer.

(The record was read.)

Q. (By Miss Barnes): You say you are Clerk of the School Board. Are you a voting member of that Board? A. Yes.

Q. And that is an elective office, is it not? Are [225] *elected* to that Board?

A. Ordinarily it is, but I was appointed because of the death of someone else, Mr. Grimm.

Q. How long have you held that position?

A. Three years, I think.

(Testimony of Lucien Q. Stubbs.)

Q. Do you know the defendants in this case?

A. Very well.

Q. How long have you known the defendants?

A. Approximately 18 years.

Q. How many children go to the school in the Housing area of the Air Base?

Mr. Weymann: Objected to. Immaterial, irrelevant to any of the issues.

The Court: Objection overruled. You may answer.

The Witness: I have some figures; I have the numbers here.

The Court: Don't you know approximately?

The Witness: May I present it to you (indicating a document)?

Miss Barnes: Let him check his figures.

The Witness: Okay. There is 695 elementary; and there is 231—I don't have my glasses—in the high school.

Q. (By Miss Barnes): How many of these children live in the Edwards Air Force reservation, other than the Wherry Housing Project?

A. I would again like to present this to her. I don't have my glasses.

Miss Barnes: He can't read it without his glasses.

The Witness: 71 Edwards, 72 Boron, 88 Mojave.

Q. (By Miss Barnes): Do I understand that there are children brought down from the town of Mojave, going to school at the Wherry Housing?

A. There is, yes.

(Testimony of Lucien Q. Stubbs.)

Q. You stated the figures. And those children are brought every day from Mojave in the school bus; is that correct?

A. State buses, yes.

Q. And children come from Boron, too?

A. Yes.

Q. Are they brought in State buses?

A. Yes.

Q. Is it true they are going to try to build a new high school in Mojave?

Mr. Weymann: Your Honor, the question calls for the conclusion of the witness.

The Court: Objection sustained.

Q. (By Miss Barnes): How long do you think this condition will go on, these children being brought—— [227]

Mr. Weymann: Calling for a conclusion of the witness.

The Witness: I can't answer that.

The Court: Sustained.

Q. (By Miss Barnes): How near is the school to the present main runway of the air base?

A. Any answer I gave would have to be approximate.

The Court: Approximately how close?

The Witness: I would say three and a half miles.

Q. (By Miss Barnes): Would you say, Mr. Stubbs, that there are more children actually coming to school in the high school at that Housing

(Testimony of Lucien Q. Stubbs.)

than there are that live there at the Wherry Housing or at the air base?

Mr. Weymann: Objected to. Incompetent and irrelevant.

The Witness: I couldn't answer.

The Court: Objection sustained.

Miss Barnes: Okay.

Q. Who operates these schools?

A. The State.

Q. Does the State own land in that area?

Mr. Weymann: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Miss Barnes: Your witness, Mr. Weymann.

Mr. Weymann: No questions. I move to strike the [228] testimony of this witness as having no bearing whatsoever on the good faith of the action of the Secretary and Assistant Secretary of the Air Force in determining the necessity for the acquisition of the subject property.

The Court: Well, upon that basis, the motion is granted.

Miss Barnes: Your Honor, we have also the motion for immediate possession, and the witnesses have been interwoven back and forth, and Mr. Weymann has claimed that the defendants' property and life is in jeopardy; and I think we are showing that they are bringing school children right into the area and that airplanes have actually crashed closer to them than to the defendants' property.

(Testimony of Lucien Q. Stubbs.)

The Court: That is a part of the immediate possession.

Miss Barnes: But that is charged——

The Court: It may remain in for that limited purpose.

Have you any cross examination?

Mr. Weymann: No cross examination.

(Witness excused.)

Miss Barnes: Mr. Hook.

HOWARD ARTHUR HOOK

a witness called on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Howard Arthur Hook. [229]

Direct Examination

Q. (By Miss Barnes): What is your name?

A. Howard Arthur Hook.

Q. What is your address?

A. 471 Sycamore Road, Santa Monica Canyon, Santa Monica, California.

Q. What is your profession?

A. I am employed by the Civil Aeronautics Administration as Chief of the Air Force Subdivision, for the Western region.

Q. And what does the western region consist of?

A. The eleven most westerly states.

Q. You are in charge of eleven most westerly states for the air force, is that right?

(Testimony of Howard Arthur Hook.)

A. That is right.

Q. Mr. Hook, how long have you been in the C.A.A.? That is the Civil Aeronautics Administration?

A. Since 1928.

Q. Since 1928?

A. That is right.

Q. Have you always been in charge of air ports, or have you held other capacities?

A. No, I have held other jobs in the C.A.A., some higher and some lower than my present job.

Q. Were you ever at the head of the regional—what is [230] that title?

A. Yes, I was regional administrator for what used to be region six of the C.A.A., which comprised California, Arizona, Nevada and Utah.

Q. During that time, have you been a member of any governmental committees or committee, or special boards?

A. Yes, a number.

Q. Were you a member of the governmental committee known as the Interdepartmental State Traffic Control Board?

A. I was a member of a governmental committee or subcommittee of a governmental committee of the Interdepartmental Air Traffic Control Board.

Q. Will you tell us, in your own words, the functions and duties and authorities of that Board?

A. The Board was created by Executive Order of the President to examine into and endeavor to work out problems of use of air space, not only as to aircraft but as to other things which might affect the operations of aircraft, such as gunnery.

(Testimony of Howard Arthur Hook.)

The various services, the military, the Navy, Air Force, the problem there, which is aircraft problems, would come before the Board for determination.

Q. What was your position on that Board, sir?

A. I was the Chairman of that Board, for about four years.

Q. What position in C.A.A. did you occupy at the time? [231]

A. Regional Administrator for the four southwest States.

Q. What was the status of civil aviation in California in 1944 and 1945?

A. Immediately after Pearl Harbor a defense zone 150 miles wide was created along the west coast. In 1944 and 1945, that defense zone still existed.

In the beginning, or shortly after Pearl Harbor, scheduled air lines were permitted to fly on flight plans carefully monitored by C.A.A. facilities, but personal flying and all forms of aviation other than—forms of civil aviation other than the scheduled carriers were brought to a stand still until it was, just little by little, permitted to start up again.

Q. Were some civil airports in the defense zone allowed to function for other than scheduled air lines?

Mr. Weymann: I will have to object to that question.

The Court: The Court will sustain the objection.

Q. (By Miss Barnes): Mr. Hook, during these

(Testimony of Howard Arthur Hook.)

various operations, as they began to open up, were aircraft allowed corridors, in other words, designated spots for flying? A. Yes,—

Mr. Weymann: Same objection, if the Court please.

The Court: Same ruling. You don't need to answer. [232]

Q. (By Miss Barnes): Are you familiar with the Barnes Airport near Muroc?

A. In a general way. I have never been on the field, but my personnel have inspected it a number of times.

Q. Do you have a map of that field?

A. I have a sketch, what we call a facility record sketch, which is made out for each airport in our region and is kept up to date by recurring inspections.

The sketch also, on the reverse side, lists essential information concerning the airport.

(Document exhibited to counsel for plaintiff.)

Miss Barnes: I would like to have that marked for identification, your Honor.

The Court: Are you going to ask him any questions about it now?

Miss Barnes: Yes.

The Court: Well, if you are, you may proceed without having it marked.

Miss Barnes: I am trying to shorten this testimony up. There is something more important here.

The Court: Just let it be marked for identifica-

(Testimony of Howard Arthur Hook.)

tion as Pancho Barnes' Exhibit No. 8. It may be so marked for identification.

The Clerk: Exhibit 8. [233]

(The document referred to was marked as Pancho Barnes' Exhibit 8 for identification.)

Q. (By Miss Barnes): Do you remember any matter pertaining to this airport coming before the I. A. T. C. B. while you were Chairman?

A. Yes, I remember you applying to the I. A. T. C. B. for permission to operate the airport again, or for civil aircraft to operate at and into your airport, even though it was in the 150-mile defense zone.

The Court: Miss Barnes, most of the time you get right to the point, but this time you are delaying.

Miss Barnes: Well, this ties in with some of the earlier testimony, in the story I was telling at the first part of the case the other day when we were in court.

The Court: Just ask the pertinent questions.

Q. (By Miss Barnes): Did I have to take action before the Board, and make a special request, and call a special meeting to force the opening of my airport?

A. There were two meetings of the subcommittee which discussed your airport. The first one was August 22, 1944; and the subcommittee voted to reopen your airport, subject to coordination of traffic patterns between you and the Commanding Offi-

(Testimony of Howard Arthur Hook.)

cer of the Muroc Air Base, so that there [234] would be no confliction.

At that time the subcommittee did not have the authority—it did not have final authority. It made its recommendations to the parent board in Washington. Its recommendations were forwarded and were approved by the parent board September 8, 1944. However, the Administrator of the C.A.A. did not designate the airport after the Board in Washington had voted to do so, and—I am not sure—my recollection is that there was some objection made in Air Force quarters, but I have found no correspondence.

The Court: Well, was the airport reopened finally?

The Witness: Yes, sir.

The Court: And was it done at Miss Barnes' request?

The Witness: It was.

The Court: Do you want to ask him any further questions?

Q. (By Miss Barnes): How much later was that? About what date was that reopened?

A. Immediately after October 2, 1945.

Q. Had other civilian airports opened before that?

The Court: I don't care about going into a comparison.

Miss Barnes: Discrimination, your Honor.

Q. Mr. Hook, you have testified that you handled these airports for eleven states. After the New-

(Testimony of Howard Arthur Hook.)

ark, New Jersey incident, there was a special committee that set the standards [235] for all airports, I believe, as a result of that accident.

Could you testify what those standards are?

Mr. Weymann: Objected to, incompetent and irrelevant.

The Court: Objection sustained.

Miss Barnes: I would like to make an offer of proof, your Honor.

The Court: You may make your offer of proof on that point. The Court, in the Court's opinion, has admitted the only point which would seem to be material, that is, that the airport was closed and was reopened, and reopened upon your request.

Miss Barnes: The offer of proof I wish to make is this: that the Air Force is now saying that I am in a dangerous position even from the new runway which isn't built yet, and are trying to remove me from my premises in thirty days, from an airport the Colonel said wouldn't be finished until December, 1954, I believe.

Now, the defendants' property and airport is well over three miles past the end of that runway, even if it were completed by that date in 1954; and these rules that we set out show a very definite space—at the end of the runway a half-mile clear way, and two miles over sparsely populated ground, and then after that they have no designation.

The defendants' property is far beyond even any recommendation made by the Board. [236]

The Court: That is a matter of argument you

(Testimony of Howard Arthur Hook.)

are making now, but you have made your offer of proof.

Q. (By Miss Barnes): How many airports are there in Los Angeles County?

Mr. Weymann: Objected to as being incompetent and irrelevant.

The Court: That would seem to be a preliminary question.

Mr. Weymann: All right.

The Witness: Would you please repeat the question?

(The question was read.)

The Witness: At present there are 16 civil airports in Los Angeles County.

Q. (By Miss Barnes): How many were there in 1940, approximately?

A. I don't have the figures for 1940, but in 1930 there were 59 in Los Angeles County, and in 1946 there were 42.

Q. Does the Civil Aeronautics Commission think that—when I say “Greater Los Angeles”, would you consider, Mr. Hook that the Antelope County in general is considered a part of the Los Angeles area from the airport standpoint?

A. Yes. Depending on the size of the community, naturally, the service area of the community, I would consider that would extend out of Los Angeles, oh, 80 or 90 miles.

Q. Do you consider that the loss of civil airports in the Los Angeles area is harmful to the development of civil [237] aviation.

(Testimony of Howard Arthur Hook.)

Mr. Weymann: Objected to, immaterial, calling for the conclusion of the witness, and no bearing whatsoever.

The Court: I believe he is in a position to answer that question.

Mr. Weymann: It has no bearing on the issues here.

The Court: It is sustained on that ground.

The Witness: The Civil Aeronautics Administration——

Mr. Weymann: Just a moment.

The Witness: Excuse me.

Miss Barnes: I would like to make an offer of proof on that to your Honor.

Civil aviation has been losing its airports, as Mr. Hook has just testified, at an alarming rate. I asked him if he considered it was harmful to them. What I am trying to prove is that the Air Force is trying to put another airport out of existence.

I will ask him a different question.

Q. Mr. Hook, do you consider that it is an alarming thing that so many—I will ask you first does the losing of airports crowd the other civilian airports to more than capacity standards?

A. The Civil Aeronautics Administration is extremely concerned over what is happening, particularly in the vicinity of the large metropolitan areas. We are currently [238] working in Los Angeles County, for example, endeavoring to get them to establish a county-wide system of public airports to replace other airports fast going out of existence,

(Testimony of Howard Arthur Hook.)

due to economic pressure of real estate and so on.

Q. Do you know whether Palmdale has been shut down to private pilots?

Mr. Weymann: That is objected to.

The Court: The objection is sustained.

Miss Barnes: I want to make an offer of proof, your Honor. I can show by the closing down of Palmdale to private pilots, they have nowhere left to go except the defendants' field, and therefore causing great hazard to life, when a little airplane can't get into Los Angeles because of bad weather, and they have nowhere to go, if our field is shut down. To give them a chance—it is really a question that affects life. It may be a great many private pilots, because they have no place to go, will try to get in when they shouldn't.

Mr. Weymann: I may say, your Honor, that in the event of any emergency landing, I have never known of any airfield, even a military airfield, that would deny permission to land in the case of emergency.

The Court: Have you any further questions?

Q. (By Miss Barnes): Is it true that C.A.A. for some years has fostered [239] a national system of airports, not only for common carriers, but also other segments of aeronautics, such as personal flying and flight training?

Mr. Weymann: I object to that, incompetent and irrelevant.

The Court: Objection sustained.

Q. (By Miss Barnes): Why has the C.A.A.

(Testimony of Howard Arthur Hook.)

financially assisted in the development of airports?

Mr. Weymann: Same objection.

The Court: Same ruling.

Q. (By Miss Barnes): Do you consider that Barnes Airport is an asset to civil aviation?

Mr. Weymann: Same objection.

The Court: Well, the objection is overruled. You may answer.

The Witness: As I mentioned before, the Civil Aeronautics Administration is quite concerned with the lack of small airports, or airports for small aircraft operation. When one goes out of existence we do our best to work with communities, counties, etc., to establish one before the other one goes out.

I would say that any airport which is used appreciably in this heavy air traffic area, which is the Los Angeles complex, [240] I would like to see something else built before others go out. To that end I would say that if the military require the land where that airport is, I hope another can first be established somewhere in the general vicinity.

* * * * * [241]

Mr. Weymann: I will stipulate that these are pictures of the defendants' property, but I will not stipulate that they may be received at this time, because that goes entirely to the question of value, and this is neither the time nor place to determine that.

Miss Barnes: We have value to consider in the bad faith of the appraisal on the declaration of taking.

Mr. Weymann: The pictures won't help on that.

Miss Barnes: They will give the idea.

The Court: I am of the opinion that those pictures would be not admissible on that point. That would be at the time of the trial.

Miss Barnes: Well, can I put them in for identification, and they are still part of the case?

The Court: You may mark them for identification.

Just take the pictures and mark them as Pancho Barnes' Exhibit No. 9, I think it is.

The Clerk: 9 will be the next number.

The Court: Mark all the pictures the one exhibit number. Just give them to the Clerk.

(A group of pictures was marked as Pancho Barnes' Exhibit No. 9, for identification.)

The Court: The Clerk has marked that entire group as Pancho Barnes' Exhibit No. 9 for identification. [243]

* * * * *

HAROLD ALLERSMEYER

a witness called on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold Allersmeyer.

The Clerk: Spell your last name.

The Witness: A-l-l-e-r-s-m-e-y-e-r.

Direct Examination

Q. (By Miss Barnes): What is your address, sir?

The Court: What is your last name?

(Testimony of Harold Allersmeyer.)

The Witness: Allersmeyer.

Q. (By Miss Barnes): What is your address?

A. Box 217, Mojave.

Q. What is your profession?

A. Sanitarian.

Q. For whom?

A. Kern County Health Department.

Q. How long have you been in that position?

A. Six years.

Q. What are your duties?

A. Inspection duties, and all the duties relating to sanitation under the laws of Kern County.

Q. Do you know the defendants in this case?

A. I do.

Q. For how long have you known them?

A. Approximately five and a half or six years.

Q. Does the County of Kern issue licenses to operate hog ranches? A. They do.

Q. Do you inspect the defendants' hog ranch from time to time? A. I do.

Q. Would you recognize this as the license issued by Kern County for the defendants' hog ranch? A. It is.

Miss Barnes: I would like to offer that for identification and have it marked.

The Court: Let it be marked——

Mr. Weymann: We will stipulate the defendant has a license to operate a hog ranch.

The Court: ——as Pancho Barnes' Exhibit No. 11 for identification.

(The document referred to was marked

(Testimony of Harold Allersmeyer.)

Pancho Barnes' Exhibit No. 11 for identification.) [252]

Q. (By Miss Barnes): Do you know of another hog ranch on the same road between the defendants' ranch and Rosamond? A. I do.

Q. Does it have a license?

A. No, ma'am.

Q. Why not?

A. Because it is on military property.

Q. Do you know about how many hogs there are there?

A. I have no idea, Miss Barnes.

Q. Is it a large number of hogs, or a small number of hogs?

A. There are numerous hogs.

Q. Several hundred?

A. Less than several hundred, probably. I would say 150 or so, perhaps. I have not seen all of them.

Q. Why don't you have jurisdiction over that?

A. Because it is on a military establishment, and I have no jurisdiction.

Q. Isn't it located on the same road the defendant's property is? A. It is.

Q. Does the Air Force lease the property to this man? Do you know?

A. Apparently. It is listed—it is labelled as [253] Air Force property.

Miss Barnes: That is all.

The Court: You may stand aside.

(Witness excused.)

Mr. Weymann: I move to strike the testimony of the witness as incompetent and irrelevant and having no bearing on any of the issues on trial before the Court.

Miss Barnes: This is a very pertinent thing; and I want to make an offer of proof, that if it is dangerous for us to have a hog ranch and our other businesses on the ranch we do have, but a short distance down the road, how can the Air Force turn around and rent a hog ranch to another man and let him operate there, and say it is dangerous for us?

The Court: The Court will consider the motion.

Miss Barnes: Now, on the witnesses, you wanted me to point out the other witnesses.

Mr. Hank Coffin—if you would stand up, Mr. Coffin—I want to take his deposition. Do you want me to tell what I can prove?

The Court: No. You understand this testimony is to be confined to the question of bad faith.

Mr. Weymann: That is right.

Miss Barnes: That would be a bad faith question.

The Court: And no other questions will be submitted to [254] the witness.

Miss Barnes: And Mr. Don Dwiggins, of the Los Angeles Daily News.

Constable George Hodges of Mojave.

Mr. Koch, J. F. Koch, who has a ranch close to us at Muroc, in fact, closer to the base than we are.

Mr. Eddie Hatcher, Detective Sergeant of the Arson Department of Los Angeles County.

Mr. Gibby Brush, of the Los Angeles Daily News.

Miss Marry Ellen Masters, and her mother, Mrs. Martha Masters.

And Lieutenant Colonel A. F. A. Kluever, who is not in the court room.

The Court: These are the witnesses whose depositions you wish to take, and there will be a limitation upon the questions to be asked, that they will refer entirely to the question of bad faith.

Miss Barnes: Yes, your Honor.

The Court: And no other questions will be asked.

And will you and Mr. Weymann agree upon the time for the taking of the depositions?

Mr. Weymann: Yes. Of course, I would like to have that as quickly as possible, as the circumstances of our office will permit.

The Court: Yes, I understand.

Miss Barnes, is that understood? [255]

Miss Barnes: Yes, your Honor, it is.

May I address the Court with a short closing speech, which I would like to have made if we finished the case?

Mr. Weymann: I would have to reply to that, and I think until the matter stands submitted——

Miss Barnes: I would like to make a speech——

The Court: Do you want to argue the case after the witnesses have testified,——

Miss Barnes: Yes.

The Court: ——or would you like to submit it without argument.

Miss Barnes: I would like to argue it, and I would like to make a speech out of order right now.

I will do it very quickly.

The Court: No, I am afraid it——

Miss Barnes: I will do it real quick.

The Court: I don't want you to make a speech until you conclude.

Miss Barnes: Can I include a copy and mark it for identification, so you can see it?

The Court: No, I won't look at it until after you have finished.

Miss Barnes: I want it in the record. [256]

* * * * *

Tuesday, February 23, 1954. 10:00 a.m.

* * * * * [259]

Mr. Weymann: These supplemental affidavits—there has been no answer filed under Rule 71 (a), which requires that the only pleadings filed by the defendant should be an answer. There has been no answer filed in this proceeding.

It is true I told the defendant that her time to answer would be extended, at the time service was made. No answer [283] has been filed.

The Court: Did you tell Mrs. Barnes she did not have to file an answer within twenty days?

Mr. Weymann: I did.

The Court: When does that time expire?

Mr. Weymann: Oh, until notice to answer.

The Court: Then you still have to give her notice to answer?

Mr. Weymann: I suppose I do. These proceedings have been going on, she filed the petition for partial withdrawal, and then filed these various motions. I think on the face of it, the supplemental

amendment to motion to set aside declaration of taking and to vacate and set aside ex parte judgment proves my very contention of bad faith on the part of the defendants.

One point I want to emphasize. Mrs. Barnes spoke of three appraisers coming there and using the same tape measure and taking the same pictures. Your Honor well knows that is a common practice of appraisers.

The Court: I don't believe that is proper to argue at this time.

Mr. Weymann: Very well.

The Court: That is for examination at the time of trial.

Mr. Weymann: That is correct. But I again urge my motion that the only issue before the Court is that of just [284] compensation. We have been held up now for six months in obtaining possession of this property, and the question of whether it is necessary to acquire this property is not a judicial question, and certainly not a question for this defendant to determine.

The Court: You say it has been held up six months, and now it occurs for the first time, as far as I know, in the testimony or by an admission of one of the attorneys that you had extended Mrs. Barnes time to answer.

Mr. Weymann: That is correct.

The Court: That time has not yet expired?

Mr. Weymann: That is right. But we moved for an order of possession August 27th.

Miss Barnes: September 9th.

Mr. Weymann: That was when the motion came up.

The Court: The Court will take a recess and I will look over the proposals.

(A short recess was taken.)

The Court: It seems to the Court when this matter was before the Court previously that there was an express stipulation, or at least an expressed statement by the Court that this matter would be heard at a later time for the purpose of supplying affidavits of certain named persons, and nothing else would be presented. Was that not agreed upon, Mrs. Barnes? [285]

Mrs. Barnes: Your Honor, it was agreed, and stipulated by Mr. Weymann and myself in front of yourself, that I might take depositions and they would be incorporated.

The Court: And wasn't there the statement the Court would not consider anything but the new depositions to be presented? Do you recall that?

Mrs. Barnes: No, it was simply there was not time in court to proceed with the witnesses on hand, and it was stipulated that I might take the depositions.

The Court: The reporter we had then has died. What is your recollection?

Mr. Weymann: That is correct, the defendant took the testimony of six witnesses, and I believe the depositions of nine other witnesses were taken in Los Angeles, and they were filed in this proceeding.

The Court: Wasn't the statement made by the

Court that nothing more would be presented, except the hearing of those depositions?

Mr. Weymann: I don't recall.

The Court: I don't either, but I think that was it. I thought this matter was continued for that purpose only, but I am not sure.

Mr. Weymann: I have no recollection.

The Court: We cannot rely upon the reporter, because the reporter is not here. The Court has not had time to [286] consider these offered amendments.

Mr. Weymann: I have just had an opportunity to read them this morning.

The Court: I have not had time to consider your motion.

Mr. Weymann: And I also have a motion to make with respect to the depositions.

The Court: I was going to suggest that the depositions may now be presented, and the Court will take these motions under advisement, the motions made by Mr. Weymann and Mrs. Barnes.

Mrs. Barnes: I believe the clerk of the court has all the depositions and the exhibits with them in the file of the court. They were all mailed in by the court reporter.

The Court: Do you have them, Mr. Eiland?

The Clerk: Yes, I do have the depositions here.

Mr. Weymann: I would like to make a motion. I move that these depositions be suppressed on the ground there is nothing contained in any of them which directly or indirectly contains any testimony as to any act of the proper authorized officer of the

Air Force, the Secretary or Assistant Secretary, which impugns his good faith or indicates any act which is arbitrary or capricious, and in that connection I would like to put the defendant upon inquiry and ask her to state to the Court whether or not there is anything in any of those depositions which contains any testimony as to [287] any act of the Secretary of the Air Force, or the Assistant Secretary.

The Court: Well, the Court will now ask Mrs. Barnes in regard to that. You may answer that.

Mrs. Barnes: Yes, indeed I will, your Honor. As to anything the Secretary or the Assistant Secretary of the Air Force did, their particular and personal actions, within those depositions, it is true that we do not refer to them in any of the testimony which is given by them. They were not present and their actions were not questioned.

However, I asked Mr. Weymann who the Assistant Secretary of the Air Force was now and he said "I don't know," and those people, the Secretary and the Assistant Secretary, they change; even during this case there is a new Secretary of the Air Force.

The situation exists, your Honor, when an agent or subordinate acts, the Secretary or Assistant Secretary are liable for any and all of the actions that take place, from his office and under his office, and while we cannot expect to say they did this or did that, the acts of their agents are the only way which we have to determine their actions. A Secretary sitting in Washington, or Assistant Secretary,

or any big government official, is very, very busy. I doubt they read a little piece of paper about a condemnation suit. I doubt very much if the Assistant Secretary that signed [288] that, Mr. Huggins, ever read that. It is a routine thing; they rely on agents. While we don't say a Secretary did a certain thing, we say he did it because he is relying naturally on the data given by his subordinates. Consequently the case is in bad faith from the start to the end, and we will show that in the depositions, that because of bad faith they removed the air base, just for the purpose of running a runway in our direction. It is in those depositions, and we have one of the colonels who drew the master plan. [289]

* * * * *

In this testimony, it might interest your Honor, in those depositions that we made, you remember the Court here, your Honor asked the question of Colonel Akers while he was on the stand, asked if those mud mines were operating at the other end of the runway, as we have shown on the map. You asked if those mines were operating and Colonel Akers told you they were not. He went on to say the only activity was the back fill.

There is testimony of five witnesses who described the [290] operation of the mines. Furthermore, we have brought in the bid of the U. S. Engineers, which is a bid calling for refilling, and the bid to refill is not now let, and one of the items in the bid is that Mud Mine No. 1 will go on operating until September 1954; the operation of the mud mines buildings are not to be moved until January 1955;

and the filling in and completion of work on the mud mines will not occur until June 1955.

Now, those things we have to know, your Honor. And in the record these officers, particularly Colonel Akers has really violated the sanctity of his oath, telling you things definitely not the fact.

Mr. Weymann: I object, your Honor.

The Court: You may reply.

Mrs. Barnes: Also they brought these maps into court. There has been a great deal of discussion of the maps, your Honor. I have shown they are not the same maps they produced. That is a disputed point, your Honor, but why couldn't they bring in the same maps?

The Court: You are arguing the entire case.

Mrs. Barnes: As far as these depositions that we took, which were stipulated to, your Honor, I need those depositions in court, because some of our most interesting facts came out in them. They are in those depositions, your Honor. [291]

* * * * *

The Court: I think the Court will deny the government's motion to suppress the affidavits, and you [294] may proceed in the manner indicated heretofore.

Mr. Weymann: Very well.

The Court: You may present the affidavits now.

Mr. Weymann: The depositions?

The Court: Oh, yes, the depositions; I misspoke myself.

Mr. Weymann: I understand your Honor desires them read into the record?

The Court: Yes, they should be read into the record.

Mrs. Barnes: The whole thing? They are all printed nicely. They are by a court reporter, you know, and are very neat.

The Court: There may be objection to some.

Mrs. Barnes: Oh, I see. O.K., your Honor.

Again, your Honor, we have three motions, the motion to dismiss, the motion to set aside and vacate the ex parte judgment, and a great many witnesses do testify on all three subjects.

The Court: The Court will consider them as applicable to whatever they refer to. [295]

* * * * *

The Court: Well, you be seated on the witness stand and read it, and Mr. McKendry may read the questions if you wish.

Mrs. Barnes: Jules F. Koch.

The Court: These were taken pursuant to the agreement?

Mr. Weymann: That is correct.

The Court: You may ask the first question, and you may answer.

(The deposition of Jules F. Koch was [296] thereupon read, as follows, Mr. McKendry reading the questions, and Mrs. Barnes reading the answers):

DEPOSITION OF JULES F. KOCH

“Q. Will you please state your name and residence?

(Deposition of Jules F. Koch.)

“A. Jules F. Kock, J-u-l-e-s F. K-o-c-h, Route 1, Box 273, Lancaster, California.

“Q. And your profession.

“A. Rancher.

“Q. Do you own property in the vicinity of the Edwards Air Force Base? “A. I do.

“Q. Will you state whereabouts it is.”

The Court: Was this one of the deponents you named at the last hearing of court?

Mrs. Barnes: Yes, your Honor. He stayed right here in Fresno.

“Q. Will you state whereabouts it is.

“A. Do you want the legal?

“Q. Well, you may as well give the legal.

“A. Section 34, Township 9, North, Range 10 West, San Bernardino Base Meridian, Kern County, east one-half of the west one-half and the west one-half of the east one-half, comprising approximately 320 acres, more or less.

“Q. Physically, in relation to the base, how close is that to the present air base line?” [297]

The Court: Do you have an additional one I might follow?

Mrs. Barnes: I think we do, your Honor. This is the Court's copy. (Handing.)

The Court: I think the last question begins at line 21.

(Defendants reading:)

“Q. Physically, in relation to the base, how close is that to the present air base line?

(Deposition of Jules F. Koch.)

“A. One-quarter of a mile, approximately, east of the east fence of the reservation as its exists now.

“Q. Don’t you mean west?

“A. Or west, I should say. Pardon me. West of the west line or the west fence of the reservation.

“Q. What sort of business is conducted there on your ranch?

“A. In one building I have a bar and a restaurant in a portion thereof, and a furniture store in the other portion.

“Q. What are the ranch activities?

“A. Cattle, hogs, hay and grain.

“Q. Do you have any sporting events there, such as hunting, and so forth?

“A. Yes, I have some duck ponds; I have 11 duck ponds for private duck shooting.

“Q. Is your place under any condemnation by the United States Government at this time?

“A. Not at this time, no.” [298]

Mrs. Barnes: Now, Mr. Weymann, do you want to play your part? You say “Objected to as immaterial.”

The Court: Mr. Weymann will make the objection.

Mrs. Barnes: The only thing is, your Honor, there was a great deal where they brought out the maps.

The Court: Just proceed with line 19, please.

(Defendants reading:)

“Q. I am going to show you some photographs

(Deposition of Jules F. Koch.)

made of some maps or enclosures which were in court on October 27 or October 30th, I guess.

“Mr. Weymann: Could we see them?”

“Mrs. Barnes: You have seen them, I presume. You made them. These are identified as joint exhibits, I believe, and the judge put them in as joint exhibits.

“Mr. Weymann: Two, three and four.

“Mrs. Barnes: Oh, yes, two, three and four. They were later named as joint exhibits. It doesn’t matter, but I remember that is the way they were put in.”

The Court: Begin at line 7.

(Defendants reading:)

“Q. Do you recognize the general outline as you see it there? To the north here is Mojave, and here is Lancaster. “A. Yes. [299]

“Q. And would you say—

“A. I can recognize the delineated area there.

“Q. Would you say your property is within that area? “A. Yes.

“Q. You see where this is listed ‘Military reservation’? “A. Yes.

“Q. Has the government made any attempt to make you an offer for your property? * * * * *

“Q. On September 9th in Fresno, September 9 of 1953, Colonel Akers was on the witness stand and I asked him a question as follows:

“Q. In fact there is other property in the same

(Deposition of Jules F. Koch.)

vicinity that isn't owned by the government, is that correct? 'A. I do not know.

'The Court: Is it in the runway portion, the other property?

'The Witness: Which other property, your Honor?

'The Court: Owned by other persons?

'The Witness: Yes, sir. There is other property in the runway area. Whether or not all the other property has been acquired or [300] not is a thing I do not know.'

"Mr. Koch, is your property under condemnation at this time?"

The Court: Mr. Weymann.

(Defendants reading:)

"'Mr. Weymann: It is under condemnation.'

"Mr. Koch, is your property under condemnation at this time? "A. It is not.

"Q. Have they ever made you an offer for your property?"

Mrs. Barnes: Mr. Weymann made a remark.

The Court: There is no objection being made now.

Mrs. Barnes: Go ahead, Mac.

(Defendants reading:)

"Q. All right. Will you please answer the question.

"A. They made me an offer this past week.

"Q. Since I have seen you?

"A. Since I have talked to you.

(Deposition of Jules F. Koch.)

“Q. Have they never filed any condemnation papers against you? “A. No.

“Q. How long have you lived there, Mr. Koch? How long have you owned the ranch? [301]

“A. I have had title to it since 1940, I believe it is.

“Q. Is there a public road in the vicinity of your ranch, a county road?

“A. Yes. It fronts south of my property; it is my south boundary line.

“Q. Is there a main county highway adjacent to your property on the east side of your property?

“A. There is.

“Q. That would be designated as what? What is that?

“A. The Kern County map has it designated as Redmand Road, otherwise known as Lancaster-Muroc Road.

“Q. What direction does that run?

“A. It runs north and south. Also, it is designated as 120th Street East in the County of Los Angeles.

“Q. Mr. Koch, was that property ever zoned by the Kern County Planning Commission, do you know? “A. It was.

“Q. Will you please explain what happened regarding that.”

Mrs. Barnes: And Mr. Weymann objected.

“Mr. Weymann, I will make an offer of proof on this: When the Air Force—and which I mean to prove——” [302]

(Deposition of Jules F. Koch.)

The Court: Do you want that read, Mr. Weymann?

Mr. Weymann: No.

The Court: Read at line 17.

(Defendants reading):

“Q. Will you please answer the question, Mr. Koch, if you can remember it. If not, the reporter will read it back to you.

“A. The Kern County Planning Commission did zone that area at the instigation of the legal officer there by the name of Major Walter Horlick.

“Q. Were you put to a great deal of concern and trouble in getting a license there? Did you have to take steps?

“A. I was. I had to take steps before the County Board of Supervisors that I was issued a use permit for the development of my property there.

“Q. Did that entail much trouble?”

The Court: Now, that objection is sustained. Do you make that objection?

Mr. Weymann: I renew that for the purpose of the record. I will renew all the objections I have heretofore made.

The Court: The objection is sustained. Do not read the answer. Begin at line 8.

(Defendants reading): [303]

“Q. What steps did you go through to be able to obtain this use permit?”

Mrs. Barnes: Well, I will stipulate everything about the trouble in the zoning there be not read

(Deposition of Jules F. Koch.)

in here because it would simply be following out the objection.

The Court: Then you skip down to where?

Mrs. Barnes: The only thing, I would like to reserve the right to have in the government did go around——

The Court: Well, you don't need to go into it. If there is something you want to present at a later time you may. Where will you skip to in the deposition?

Mrs. Barnes: Well, I would like to go to line 25, page 9.

The Court: You may ask the question.

Mrs. Barnes: "Q. Do you know anything about the operations of the California Central Airlines in regard to the Edwards Air Force Base?"

Mr. Weymann objected here again, your Honor.

The Court: The objection is sustained.

Mrs. Barnes: Do I make an offer of proof later, your Honor? The only thing is here in the record. Could I tell you?

The Court: Just read your offer of proof, line 5.

Mrs. Barnes: "Well, I am going to make an offer of proof on that: I run a flying field on my [304] property and had two airlines, one the Panamint Airlines and one the Desert Airlines, both operating from that field and running up to Inyokern, Los Angeles to Inyokern vicinity; and California Central Airlines wished to use my field, but the Air Force talked them out of using my airport, which is a licensed and proper airport and I op-

(Deposition of Jules F. Koch.)

erate other airlines off of it, and made a deal with the California Central Airlines to operate off of the air base."

I asked him to show the letter and tickets to prove that they did that in order to stop the operation of my own field.

The Court: Are you reading the next question?

Mrs. Barnes: No.

(Defendants reading):

"Q. Now, Mr. Koch, I am going to show you here a letter addressed to yourself. Would you read that letter into the record. Can you see it?

"A." This is from "Headquarters, 6510th Air Base Group, Edwards Air Force Base, Edwards, California. 21 December, 1951.

"Mr. J. F. Koch, Route 1, Box 273, Lancaster, California.

"Dear Mr. Koch: [305]

"Reference is made to our conversation relative to your use of the California Central Airlines facilities. I regret to inform you that the privilege afforded you in the past must be continued. Our higher headquarters has indicated——"

Mr. Weymann: Doesn't it say "discontinued?" You read "continued."

Mrs. Barnes: Thank you, Mr. Weymann.

"I regret to inform you that the privilege afforded you in the past must be discontinued.

"Our higher headquarters has indicated, in writing, that the agency must be limited to patronage by Base personnel only."

(Deposition of Jules F. Koch.)

And that is signed by "C. A.——"

The Court: Kurpiewski, Major, Air Base Group Commander.

Well, the Court will take a recess at this time.

The next question will be on line 9, page 10.

The Court is now in recess, until 2:30.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:30 o'clock p.m. of the same day.) [306]

* * * * *

(Defendants reading):

"Q. Did you receive that letter, Mr. Koch?

"A. I did.

"Q. And until you were stopped from riding on that [308] airline, did you ride that airline?

"A. Yes.

"Q. Is this an airline ticket and time schedule attached to the letter?

"A. That is right.

"Q. Was that your own ticket stub?

"A. That is right.

"Q. From where to where did you ride that airline?

"A. The Lockheed Air Terminal, Los Angeles, to Muroc.

"Q. Do you know, is that a public franchise line, public carrier?

"A. It must have been. I merely walked up and bought a ticket. There was no question about it. I surmised and supposed that it was a fran-

(Deposition of Jules F. Koch.)

chise line. They certainly wouldn't have a schedule of this type unless there was, I take it."

Mrs. Barnes: Pardon me one second, your Honor. Should I mention at these various places in the deposition which motion these various conversations refer to?

The Court: Well, I think you should just read the deposition, have the deposition read. If there is anything you want left out, it is entirely satisfactory to the Court to announce you are skipping that. Is that correct? [309]

Mr. Weymann: That is correct. And it may be understood that my objection is a continuing objection?

The Court: That is understood by the Court.

Mr. Weymann: Very well.

Mrs. Barnes: What I mean is, your Honor, we have three main motions.

The Court: Oh, you don't need to go into that.

Mrs. Barnes: This particular airline that they stopped, they would not allow them to be on my place but allowed them on a secret base.

The Court: You would have to leave that to the Court. If you would read it all without any comment.

Mrs. Barnes: That would have nothing to do with possession. That would be bad faith in the original case.

Now, we will be reading on page 12, line 15?

Mr. McKendry: Yes.

(Defendants reading):

(Deposition of Jules F. Koch.)

“Q. Mr. Koch, were you in court in Fresno on October the 30th, 1953?

“A. Yes, October 27, 28, 29 and 30, four days.

“Q. Well, the judge was sick for two days. I am referring now to the last day in court.

“A. I was.

“Q. Which would be the 30th.

“I am going to read you from that court [310] transcript, Mr. Koch:

“‘The Court: Colonel’——

“‘The Court is speaking and Colonel Akers is on the stand. He said, the Court said:

‘Colonel, there is one question I want to ask: Can you point out on this Enclosure No. 1, Exhibit 2, just about where those mud mines are that are being worked on?’

‘The Witness: One qualification, your Honor: The mud mines are not being worked now. Operation of those mud mines has been stopped some time ago. They are located in this general area herein (indicating).

‘The Court: Well, I got the impression from the testimony this morning that they were now being worked, the mud mines were being worked. You say that they are not being worked?’

‘The Witness: Mining operations have ceased as of some time ago; the work being done there now is the process of filling them back up again.’

Do you remember that testimony?

“A. Yes, I have a fair recollection of it.

(Deposition of Jules F. Koch.)

“Q. Mr. Koch, have you been over near those mud mines lately? [311]

“A. Yes, I believe I was over there last week.

“Q. Do you know whether or not they are in operation?

“A. They have a number of draglines there cleaning out those pits and hauling the mud over to the mill.

“Q. Did you see them doing that?

“A. Yes.

“Q. In other words, they are working the mud mines; is that correct?

“Mr. Weymann: That isn't what he said.

“Q. Well, Mr. Koch, would you say that those mud mines are in operation or are not in operation?

“A. Well, I said that they were cleaning the pit there and separating the good material and hauling it over to the mill. You can construe that as only one thing, I would say.

“Q. Did you see any backfilling going on?

“A. No.

“Q. Did you see any indication of work to make any backfill? “A. No.”

Mr. McKendry: The next question is page 15, line 17.

The Court: I didn't hear that remark.

Mr. McKendry: Pardon me. The next question is page 15, [312] line 17.

The Court: Very well.

(Deposition of Jules F. Koch.)

(Defendants reading):

“Q. Mr. Koch, have you had occasion lately to drive between we, the defendants’ property, and Rosamond, California?

“A. Yes. Oh, yes.

“Q. What is the state of the county highway between Rosamond and the defendants’ ranch?

“A. Well, when you say ‘state of the highway,’ I would like to know what you are referring to.

“Q. Well, did the road from Rosamond use to run from Rosamond directly by the defendants’ property? “A. It did.

“Q. Has another road been cut into that county road? “A. There has been.

“Q. When it was cut into the county road, did it cut off the road to the defendants’ property?

“A. It didn’t cut off the road, but it doesn’t look to me like the job was ever completed. The new road was cut into it, but there was a bad detour made on county-road property there and it hasn’t been completed or if it will ever be completed, that [313] I don’t know.

“Q. Well, would it be necessary for a person, yourself, for instance, driving from Rosamond to the defendants’ property, to go out into the desert alongside of the highway to get back onto the Kern County road?

“A. That is on the detour, yes.

“Q. In other words, you have to leave the pavement and detour to get back onto the highway

(Deposition of Jules F. Koch.)

again to get to the defendants' property, is that correct? "A. That is right."

The next question is page 17, line 23:

"Q. Do you know who General Holtoner is, Mr. Koch? "A. Yes.

"Q. Who is he?

"A. The commanding officer of the Edwards Air Force Base.

"Q. Did you ever hear General Holtoner threaten to bomb the defendants? "A. I did.

"Q. Did he mention what he was going to bomb the defendants with? "A. Yes, he did. [314]

"Q. What was it?

"A. A napalm, he called it.

"Q. Napalm bombs?

"A. Napalms. I don't know whether it is a bomb or what it is. Napalm.

"Q. Do you remember approximately when he made that threat? "A. No.

"Q. To refresh your memory, would that have been approximately the 26th of last February? Could that have been then?

"A. Well, it could have been, if that is the time that you served a subpoena on him, and that is the date that this all occurred."

Mrs. Barnes: I think that finishes that particular deposition.

The Court: Very well.

Mr. Weymann: Now, if the Court please, I move to strike the deposition of Mr. Koch as read into the record, on the grounds it is entirely incom-

petent, irrelevant and immaterial as bearing on the good faith of the Secretary, or Assistant Secretary of the Air Force in making the determination to take the subject property.

The Court: You may step down, Mrs. Barnes.

Mrs. Barnes: I would like to make an offer of proof. [315]

The Court: As to this matter?

Mrs. Barnes: Yes, just what he said when he objected to it.

Mr. Weymann: If the Court please, I understood the purpose was to read these depositions into the record.

The Court: That is what it was.

Mr. Weymann: So I think an offer of proof is entirely out of order.

The Court: Yes, it would be. There is no evidence before the Court except that contained in the depositions.

Mr. Weymann: That is correct.

The Court: And the Court has permitted you to read all portions that you deemed to be material. The Court will take it under advisement for the present. Now, you may proceed with your next one.

Mrs. Barnes: This is the deposition of—Mr. Eiland, may the Court have the copy of the deposition of George W. Hodges, taken on behalf of the defendants, on Tuesday, November 17, 1953, at 800 Federal Building, Los Angeles?

Mr. Weymann: The same objection to this, and all subsequent depositions.

The Court: It is understood you make the same objection to each and all of the depositions.

Mr. Weymann: That is correct, your Honor.

The Court: I have it. [316]

DEPOSITION OF GEORGE W. HODGES

Mr. McKendry: On page 2, line 9.

(Defendants reading):

“Q. What is your name, Mr. Hodges?

“A. George W. Hodges, H-o-d-g-e-s.

“Q. What is your profession, Mr. Hodges, and residence?

“A. Mojave, California.

“Q. Your profession?

“A. I am constable of the Mojave Judicial District.”

And the next question is page 7, line 14:

“Q. Constable Hodges, have you had occasion lately to drive on the road from Rosamond that extends to the defendants’ property?

“A. I have.

“Q. Do you know if that is a county road?

“A. Yes.

“Q. Has there been any break or obstruction on that road that you know of? “A. Yes.

“Q. Do you know approximately how long that road has been obstructed?

“A. I couldn’t be positive as to that. It has been a considerable length of time. But as far as giving you an exact time I couldn’t.

“Q. In going from the defendants’ property,

(Deposition of George W. Hodges.)

[317] in going from Rosamond to the defendants' property at this time, what is the necessary procedure?

"A. Well, you have to detour where the intersection of the new Edwards and Rosamond Road comes in for a considerable distance out into the desert, before getting back on to the old Muroc-Edwards Road.

"Q. If you were a guest attempting to get to that ranch, would you consider it difficult to find your way? "A. Yes."

Line 23, same page:

"Q. I want to read to you from the transcript of that case."

The Court: At what place is that?

Mr. McKendry: Line 23, page 8.

The Court: You may proceed.

(Defendants reading):

"Q. I want to read to you from the transcript of that case. Colonel Akers is the witness upon the stand at the time, and the Court asked him this question:

"The Court: Colonel, there is one question I want to ask: Can you point out on this Enclosure No. 1, Exhibit 2, just about where those mud mines are that are being worked on? [318]

"The Witness: One qualification, your Honor: The mud mines are not being worked now. Operation of those mines has been stopped some time ago. They are located in this general area here.

"The Court: Well, I got the impression from the

(Deposition of George W. Hodges.)

testimony this morning that they were now being worked, the mud mines were being worked? You say that they are not being worked?

‘The Witness: Mining operations have ceased as of some time ago; the work being done there now is the process of filling them back up again.’

Did you hear that testimony, Colonel Hodges?

“A. Well, I believe I did, but whether I was in court all the time, whether I could pinpoint that special testimony, I don’t know.

“Q. Well, do you have any knowledge as to whether or not those mud mines are being worked?

“A. Well, I had occasion to go out to the mud mines Monday, yesterday, and I went inside the big plant—well, I went to the buildings, and I contacted the people there and found out that the man I was looking for wasn’t there. But there was, I think, three or four big truck loads of mud that passed me going out of there loaded in the trucks, and there was plenty of mechanics and staff around [319] the buildings there at first; but as far as going out on the lake and seeing where they were getting the mud from, I don’t know. But they were hauling the mud out of there.

“Q. Did you see any indications of a backfill going on at that time? “A. No.”

Mrs. Barnes: Your Honor, that completes the deposition of Mr. Hodges.

The Court: The same motion?

Mr. Weymann: The same motion, your Honor.

The Court: It is under advisement.

Mrs. Barnes: Mr. Eiland, will you find there the deposition of John Holt, which was taken here because Mrs. Buck took it; it was right here at the court.

The Court: You may sit down, Mrs. Barnes.

Mr. McKendry: It will be on page 2, line 21.

The Court: That is the deposition of John Holt?

Mr. McKendry: Yes.

DEPOSITION OF JOHN HOLT

(Defendants reading):

"Q. Will you please state your name, sir?

"A. John Holt.

"Q. And would you please state your address?

"A. 540 Fourth, Arvin, California.

"Q. What is your position? [320]

"A. Chairman of the Board of Supervisors of Kern County.

"Q. How long have you held that position?

"A. Approximately three years."

And continuing on page 3, line 20:

"Q. As well as being Chairman of the Board of Supervisors, you are also the supervisor in charge of that district which is the same district in which the defendants live and where the Edwards Air Force Base is situated, are you not?

"A. That is right.

"Q. And which district is that, Mr. Holt?

"A. No. 2."

Continuing to page 7, line 4:

"Q. You have mentioned, Mr. Holt, that you

(Deposition of John Holt.)

had talked to both Colonel Akers and Colonel Elvin. Did they tell you what roads they were building within the territory which would be taken in in the expansion program of the Air Field?

“A. Yes, they discussed the general program of the proposed roads, particularly speaking, about the north-south road leading from 466 to the road leading into Rosamond, where they are building up this road going through the Wherry Housing project; and at the time this road is constructed it is their [321] intention to turn the road over to the County and then the County abandon the other roads within the reservation, of course with the understanding that the legal aspects must be taken care of as it goes along.

“It is impossible for the County of Kern to abandon any road except under the due process of law.

“Q. When you speak of abandoning roads, specifically did they mention any particular roads to be abandoned?

“A. Yes, that was that portion that this new road would replace.

“Q. And where would that road be?

“A. Well, I can mention—I understand what you mean. It does go by your place. That was a portion of the road that was meant to be abandoned.

“Q. Do I understand you to say that they offered to trade this other road to the County for your abandoning the road that goes by the defendants' property?

(Deposition of John Holt.)

"A. Yes, you could say that that would be the gist of the conversation. After the road, of course, was improved and certain processes of law take place, of abandonment, that was the intent. It was agreed after these processes of law would take place that [322] would take place, we would accept the new road and the County would abandon the other road.

"Q. Was it agreed that the County would then take upon themselves the expense of maintaining this other road?

"A. Yes. The new road you speak of? Yes.

"Q. Have Colonel Akers or Colonel Elvin or any other Air Force officer notified the County, to your knowledge, about cutting into this road that goes by the defendants' property? "A. No.

"Q. Have the officials that we just mentioned contacted the County and asked permission to cut off this road?

"A. No, not to my knowledge they haven't."

Continuing, your Honor, to page 9, line 8:

"Q. Mr. Holt, what would be the usual procedure when they cut into a road?

"A. Well, I think by State law, to my knowledge anyone that wants to intersect into a State or Federal road, or even a County road or city street, must make the proper application to encroach upon the road, and perhaps have specifications approved as to the standards of the particular road.

"Q. Who would that application be made to?

(Deposition of John Holt.)

“A. It would be made to the Road Commissioner of the County.

“Q. Do you know if the Road Commissioner has ever had an application such as that made to him?

“A. Well, I inquired, of course, as to that, when I heard the road had been cut into, and no application had been made.

“Q. On the County road situated just to the west of Rogers Dry Lake, do you know if a hangar has been located, situated, under the process of construction, right in the middle of a County road, or approximately, in other words, where it was intersecting a County road?

“A. Well, that came to my knowledge when the contractor approached the Board of Supervisors, stating that he had a contract with the Army to build such a structure, and that this work had to be done immediately.

“We, the Board of Supervisors, did not acknowledge that such a building would be constructed, but, wanting to cooperate with the Army, we turned our back on the situation as it is today, and of course today the building is on County property, but it is with our knowledge and approval.

“Our reasoning on this is that the Army does [324] have a bypass or detour around this location, and the general public's welfare is taken into consideration.”

Continuing, your Honor, to page 13, line 8:

The Court: To what page?

(Deposition of John Holt.)

Mr. McKendry: Page 13, line 8:

“Q. Would you say, Mr. Holt, that the County roads are running much closer, by a question of miles, to the military reservation, than the defendants’ property—than where the defendants’ property is situated?

“A. Are you speaking of the enclosed area, the enclosed gate or area?

“Q. Yes.

“A. Yes. Now, of course, the County roads do run very closely to the main gate of the reservation, or administration buildings.

“Q. It is true, also, that the County roads parallel the west portion of the military reservation, running north and south?

“A. Yes, there is a road, you might say, that bisects through, running from 466 to the County line, the Los Angeles County line.”

Mr. McKendry: That completes the deposition of Mr. John Holt. [325]

Mr. Weymann: The same objection, your Honor; the same motion to strike.

The Court: The Court will take it under advisement.

Mrs. Barnes: Mr. Eiland, the deposition of Arnold F. A. Kluever.

Mr. McKendry: This is the deposition of Arnold A. F. Kluever, taken on Thursday, November 19, 1953, on behalf of the defendants.

The Court: A. F. Kluever or F. A.?

Mrs. Barnes: Arnold F. A. That is correct.

It is a misprint on our copy. Your Honor, you have a corrected copy; we do not have. I believe the Colonel corrected it later.

The Court: Proceed.

Mrs. Barnes: So you may find it——

The Court: It will not make any difference; it is the same man.

Mrs. Barnes: Yes. It may be in some of the testimony, but you will see by your copy.

Mr. McKendry: Page 2, line 24:

DEPOSITION OF ARNOLD F. A. KLUEVER

(Defendants reading):

“Q. Will you state your education, Mr. Kluever?

“A. How far back, college?

“Q. Well, your general training and college [326] education.

“A. Well, I had four years of a five-year course at Iowa State College at Ames, Iowa, in General Engineering and Electrical Engineering.”

The Court: Did he testify here?

Mrs. Barnes: No, your Honor. This is on deposition.

(Defendants reading):

“——in General Engineering and Electrical Engineering, majoring in Technical Journalism. I ran out of money at the end of four years so I didn't finish the five-year course.

“From there I went to C.C.C. duty as a Second Lieutenant in the Field Artillery Reserve four and a half years——”

The Court: It says two and a half years.

(Deposition of Arnold F. A. Kluever.)

Mrs. Barnes: You have a corrected copy. Ours says four years.

The Court: Should it be two and a half years?

Mrs. Barnes: Your copy is correct.

The Court: Two and a half.

Mrs. Barnes: Yes.

(Defendants reading):

"Then to the Air Force Flying Cadet School, and graduated from there in October of 1938, and I have been in the Air Force ever since until my [327] discharge on 5 May of this year.

"While in the Air Force I spent one year in a graduate course in Meteorology at M.I.T. in Cambridge, Massachusetts, and I had a two-year course in Engineering Sciences at the Air Force Institute of Technology at Wright Field, and a six months' course in—I will get the right title—it is Air Installation Engineering course, and then I also had the regular courses at Gunter Air Force Base at the Communications Electronics Staff Officers' School and at the Air Command and Staff School at Maxwell Field, Montgomery, Alabama.

"Q. Did you at any time specialize in meteorology, have special training in that?

"A. I had that the year we took the full year's course of one-hundred and four credits at M.I.T. in seven and a half months. There were four Air Force Officers, four Navy Officers, and the balance of the class was cadets. That was the first year they had commissioned cadets directly from the course as Second Lieutenants in Weather Service,

(Deposition of Arnold F. A. Kluever.)

and I spent three years as Staff Weather Officer.

“Q. Did you ever serve at the Air Base at Muroc, California? [328]

“A. I was sent out to Muroc Army Air Field in February of 1946. I arrived there, I think it was the 9th.

“Q. Did you have command at that Base?

“A. General O'Donnell, Emmett O'Donnell, he sent me out there to take command of the base to replace Colonel Clarence Shoop who was being returned to civilian status. And Colonel Gilkey was on leave and wouldn't be there for at least three months. So I was to take command of the base until Colonel Gilkey's arrival. After Colonel Gilkey arrived I remained as Deputy Commanding Officer for four more months, until August 20 of 1946.

“Q. During the time that you were at the Muroc Air Force Base did you draw any plans for that Base?

“A. I drew the original master plans for the expansion of the Base, in accordance with the directives that started coming from Washington in February of 1946.

“Q. You were there until those plans were completed?

“A. I was the only one, except I had the assistance of two enlisted men in the last two weeks in order to help draw up the necessary copies of the plans. [329]

“Q. How many copies of those plans did you

(Deposition of Arnold F. A. Kluever.)

take back or what did you do with those plans when they were finished?

"A. We made them up in 12 sets; two copies remained at the Muroc Army Air Field, as it was known at that time, and ten copies I flew personally to Wright Field and delivered them to the Air Installation Division under the Air Materiel Command. That is at Wright Field in Dayton, Ohio.

"Q. Was that plan officially approved?

"A. It was.

"Q. You are fully discharged from the Government at this time, aren't you?

"A. That is right; I have an Honorable Discharge."

Continuing on the same page, at line 23:

"Q. Referring to this original master plan, Colonel Kluever, who instructed you to draw that plan?

"A. Colonel Gilkey.

"Q. Did he as Base Commander at that time approve that plan?

"A. He approved the plan and wrote a letter of commendation for my work on it. I worked day and night and weekends to conclude it, have it finished on time. [330]

"Q. That is the letter we have just referred to, Colonel Kluever? "A. It is.

"Q. Will you please read that into the record?

"A. This is headed, 'Headquarters Muroc Army Air Field, Office of the Commanding Officer, Muroc, California. It is dated 15 August, 1946.

(Deposition of Arnold F. A. Kluever.)

‘Subject: Letter of Commendation.

‘To: Lt. Colonel A. F. A. Kluever, AC,O-22413’

—that was my serial number before they changed it to a system of regular officers.

‘4144th AAF Base Unit, Muroc Army Air Field, Muroc, California.

‘1. It is with pleasure that I extend to you my commendation for the excellent work you performed while assisting in the preparation of the folder of AAF Basic Information for Master Planning of Muroc Army Air Field, during the period 1 July - 13 August 1946.

‘2. The many extra hours that you put in during evenings and on week-ends denotes a high regard for duty and loyalty to this command and the Army Air Forces.

‘3. A copy of this letter will be placed in your 201 file. [331]

‘S. A. Gilkey, Colonel, Air Corps, Commanding.’ ”

Continuing on line 8:

“Q. Colonel Kluever, when this master plan was drawn, did it include the taking in of the defendants’ property in this case? “A. It did not.”

Continuing on page 8, line 12:

“Q. Will you please, Colonel Kluever, and I might say to you that it has been discussed about

(Deposition of Arnold F. A. Kluever.)

the moving of the railroad in the case up in Fresno. Did you advocate at that time that the railroad be moved?

“A. That was included in my plan, to run the railway around the north end of the lake so that we would have one continuous runway the north and south length of the lake.

“Q. There has also been a great deal of talk about the runway which they are starting to construct and which lies in such a line as it would come and be headed towards the defendants’ property. That has been fully gone into. Your general east-west runway that you have in the plan, approximately where did that go?”

The Court: Pardon me. Will you read that, Miss Schulke?

(The record was read.) [332]

Mrs. Barnes: We are on page 8.

The Court: Yes, I have it. You may proceed.

(Defendants reading:)

“A. It went from Muroc Dry Lake across Rosamond Dry Lake, and the way I had it laid out they would put in a twenty-two mile runway with less than 16 inches difference in elevation. The only thing they needed to build the runway was waste oil. The purpose of the waste oil was to cut the mirage down so the pilots wouldn’t land fifty feet too high.

“Q. Now, you have testified that you had special training in meteorology and weather. Was this runway laid out with regard to the local conditions?

(Deposition of Arnold F. A. Kluever.)

“A. Part of the master plan included one sheet in the plan which was the wind rose showing the condition of all the winds——”

Mrs. Barnes: That is wrong the way the court reporter has it. It is “rose” but it sounds the same.

The Court: The answer is “Part of the master plan included one sheet in the plan which was the wind rose——”

Mrs. Barnes: Oh, does it? They have corrected your copy then.

“——showing the condition of all the winds averaged out over the period of the ten previous [333] years, and the two runways that I laid out took in 98 per cent. of all winds during that time.

“Q. Knowing the terrain there at Muroc, would you say that the present runway which would be cutting through where the buildings are now at the Air Base, and running in the direction of the defendants’ property, that if that were ever to be leveled into a flat runway, would that involve considerable excavation and fill?

“A. They would have to make it close to, somewhere around 70 feet or 70 foot cuts through there, and wide enough to clear the runways on both sides for a thousand feet in the danger zone, and there is a danger zone of 1,000 feet difference in elevation extending three miles on either end of each of the runways that I laid out, which is well under that thousand feet. But to lay out a runway the way they have it planned now, as you have explained, it would involve at least several million dollars’ worth

(Deposition of Arnold F. A. Kluever.)
of grading and excavating, not to mention moving buildings and throwing away all permanent installations presently on the base.

“Q. I am going to show you a document here which is noted as Exhibit 4, I believe it is noted as a Joint Exhibit No. 4 in this case, which is the [334] proposed new runway or the runway that they are presently attempting to construct. Is that about what you had in mind on this testimony you have just given? This only shows the proposed runway. This is another map which is the same set, from the same set of the three maps. This is the present concrete runway in front of the two big hangars and here will be the new runway labeled from A to B.

“A. Well, I can show you what I mean. It came from this tip down here across here, which missed your property entirely, and went to the far end of Rosamond Dry Lake, and the danger zones on either side of those runways are completely clear in all directions.

“Q. How far, approximately, would the runway which you drew to the south of the defendants' property missed the defendants' property? Just approximately.

“A. Well, I don't see the hospital area on here, but the runway that I had laid out missed the hospital area which is up on top of the hill under what was the west side of the Base then, and the highway went past there and your property was even further north than the hospital area. The runway which I laid out missed the hospital area. [335]

(Deposition of Arnold F. A. Kluever.)

“Q. Is it correct that that plan would have utilized all the present buildings on the Base?

“A. It would, all except the ones that we were authorized to tear out, which were called A-huts, which had half the roofs off and were unfit for habitation.

“Q. There are two very large, gigantic hangars located there at the Base. Do you know if they were intended to be temporary structures or permanent structures?

“A. Permanent structures and were so classified.

“Q. You mentioned that the original master plan had been approved by Colonel Gilkey; is that correct?

“A. That is right, and then I flew it to Wright Field for approval there at the Air Installation Division. We had a three day meeting there with representatives from all of the other airfields and Air Materiel areas represented under the Air Materiel Command, and every one had ten sets of their plans there and each of them, each set was reviewed and approved there, as far as I know, because after that I left Muroc about a week after I flew up there. I was transferred back to Wright Field to attend a two year school in engineering sciences. [336]

Q. As far as you know, then, Colonel Kluever, the change of plan came after this plan was made, and as you can see by the Air Force maps, which were introduced into evidence up at Fresno, that would have entirely changed the plan?

(Deposition of Arnold F. A. Kluever.)

"A. The only place it fits the plan that I originally drew, was moving the railroad around to the north end of Rogers Lake there.

"Q. Then you would say there was a definite relocation subsequently made of that runway, of the main runway? "A. Definitely."

Mrs. Barnes: Your Honor, that completes Colonel Kluever's deposition.

Mr. Weymann: The same motion to strike, your Honor; that the opinion of this deponent is of no avail to impeach the discretion or determination of the responsible officer of the Air Force. Under the authority of United States against Meyer, it has no bearing on the determination as to what property is to be taken. We are not trying the wisdom or the feasibility of this determination here; all we are trying is the question of good faith.

The Court: The Court will take it under advisement.

Mr. McKendry: The next deposition was of William H. Coffin, taken on Thursday, November 19, 1953, on behalf of [337] the defendants.

Mr. Weymann: What deposition is that?

Mr. McKendry: William H. Coffin. Starting on page 2, line 8:

DEPOSITION OF WILLIAM H. COFFIN

(Defendants reading:)

"Q. Mr. Coffin, will you please state your name.

"A. William H. Coffin.

"Q. What is your residence address?

(Deposition of William H. Coffin.)

"A. 2310 North Vermont.

"Q. What is your profession?

"A. Airport operator.

"Q. Are you a pilot? "A. Yes.

"Q. How long have you been a pilot?

"A. Since 1924.

"Q. How long have you been operating—I presume, of course, you have been operating aircraft since 1924, then. "A. Yes.

"Q. How long have you been an airport operator?

"A. Possibly '34 or '35. I am not exactly sure. It was when I first reached Alhambra.

"Q. Were you operating an airport on December 7, 1941? "A. Yes. [338]

"Q. Where was that? "A. Vail Field.

"Q. Where is that located in relation to Los Angeles? "A. East Los Angeles.

"Q. Was this airport closed due to the war emergency? "A. Yes.

"Q. Was it closed for the entire duration of the war? "A. No.

"Q. Approximately when was it first opened?

"A. On February 6, 1944.

"Q. When this airport was first opened, were there any special restrictions? "A. Yes.

"Q. Could you explain those?

"A. From February 6th, 1944, to June the 3rd, we were only allowed to fly in and——"

it says "put" but it should be "out of Vail."

(Deposition of William H. Coffin.)

The Court: I think the word should be "out" instead of "put", "in and out" it should be, "allowed to fly in and out of Vail Field."

(Defendants reading:)

"—under an authorized flight plan, the flight [339] authorization which was given to us by the Civil Aeronautics Authority, and in conjunction with the West Coast Defense under the command of Commander Black.

"Q. What was the date, then, that that special qualification ended that you have stated there?

"A. Well, on June the 3rd of 1944 we started operating right from Vail Field, back on Vail Field in a—we had a corridor in the vicinity of Vail Field which was assigned to Vail Field, Monrovia and East Los Angeles.

"Q. Were all the airports operating the same way at that time?

"A. Yes, we all opened on that same day for student instruction.

"Q. You have mentioned student instruction. Was there any other kind of flying?

"A. Oh, yes, we were allowed to continue, of course, these flights in and out of the zone, fly wherever we chose at that time.

"Q. Did you do any charter work?

"A. Yes. The charter work was opened to all airports at that time anywhere on their flight plan.

"Q. And you could fly the passengers or people

(Deposition of William H. Coffin.)

that wanted to hire the plane could take them; [340]
is that correct? "A. Yes. That is correct.

"Q. Are you at this present time operating and
running an airport? "A. Yes.

"Q. What is the name of that airport?

"A. Whiteman Airport.

"Q. Approximately how many airplanes do you
have on that airport?

"A. Well, between 200 and 230. It fluctuates
with the transients.

"Q. Where is that airport located?

"A. Pacoima.

"Q. Is that in the San Fernando Valley area?

"A. In the San Fernando Valley.

"Q. Are you acquainted with the defendants'
airport? "A. Yes.

"Q. Approximately how close is it by air to your
airport? "A. Forty miles.

"Q. Do ships from your airport ever have oc-
casion to land on account of weather out of the
area? "A. Yes. [341]

"Q. Are they known to sometimes land at the
defendants' airport? "A. Yes.

"Q. Would you consider that the defendants'
airport is of necessity to commercial aircraft?

"A. Yes. I will qualify that, particularly since
Palmdale has been closed for commercial aircraft.
There is nothing else in that area.

"Q. I would like to have you qualify yourself.
For instance, do you hold a CAA license?

(Deposition of William H. Coffin.)

"A. Yes.

"Q. What ratings do you hold?

"A. All ratings, land and sea, single and multi-engine.

"Q. Approximately how many numbers of hours do you have in the air? "A. Over 13,000.

"Q. Do you have any ground-school ratings?

"A. All ratings."

Mr. McKendry: Your Honor, that completes the deposition of William H. Coffin.

Mr. Weymann: The same motion.

The Court: You make the same motion, and the Court will make the same ruling.

Mr. McKendry: This is the deposition of [342] Don Dwiggins, taken on behalf of the defendants, on November 19, 1953.

Mrs. Barnes: In order to cut this short, I have taken a little squib out of page 6.

Mr. McKendry: Page 6, line 1.

The Court: I am sorry.

Mr. McKendry: Page 6, line 1, in order to shorten it.

The Court: I understand. On page 6, line 1. Very well.

DEPOSITION OF DON DWIGGINS

(Defendants reading:)

"Q. Mr. Dwiggins, do you have occasion to use the defendants' property, the airport on the defendants' property from time to time?

(Deposition of Don Dwiggins.)

"A. I have used it frequently in my business as a reporter covering aviation stories and disasters. I have used it frequently in flying with the privilege of a private pilot, not a commercial pilot, although I hold a commercial license, several times when I was unable to get into Los Angeles due to the weather conditions. During those times I have used it.

"Q. Do you feel the defendants' field is helpful to or necessary to private aviation?

"A. Yes, I definitely do."

Mr. McKendry: Your Honor, that completes the portion of the deposition of Don Dwiggins.

Mr. Weymann: The same motion. [343]

The Court: The same ruling is made. I think the Court will take a recess.

(A short recess was taken.)

The Court: Take the stand, Mrs. Barnes.

Mr. McKendry: This is the deposition of E. B. Hatcher, taken on behalf of the defendants on Thursday, November 19, 1953, starting on page 2, line 10:

DEPOSITION OF E. B. HATCHER

(Defendants reading:)

"Q. What is your name?

"A. E. B. Hatcher, H-a-t-c-h-e-r.

"Q. Your residence address.

"A. 3608 Buckingham Road, Los Angeles 16.

"Q. Your profession.

(Deposition of E. B. Hatcher.)

"A. I am a detective sergeant attached to the main office detective bureau in charge of the arson detail of the Los Angeles County Sheriff's Office.

"Q. What does your profession consist of, Mr. Hatcher?

"A. Well, I am primarily charged with the responsibility of the investigation of all suspicious fires that occur within the County of Los Angeles in that unincorporated portion patrolled and maintained by the Sheriff of Los Angeles County. In addition, I conduct investigations to determine the cause and origin of fires within the 44 cities within the [344] County of Los Angeles at the request of either the Chief of the fire department or the Chief of the police department in that city. In other words, the only city where we do not conduct an investigation is the City of Los Angeles. But we only conduct those investigations in those other cities at the request of the Chief of the fire department or the Chief of the police department.

"We are also available for the checking of the cause and origin of fires on loan to any other county or governmental agency.

"Q. How long have you been doing this kind of work?

"A. I have been in the fire investigation field approximately 25 years, of which since September the 20th of 1947 I have been in charge of the arson detail.

"Q. Do you know if there has been a great many incendiary fires around the town of Lancaster?

(Deposition of E. B. Hatcher.)

“A. There have been.

“Q. Have there been a good many incendiary fires around the town of Mojave?

“A. There were in past years.

“Q. Did they have a good many incendiary fires on the air base? [345]

“A. To my knowledge there were three that were suspicious on the air base.

“Q. Chief Hensley testified in Fresno under questioning as follows:

‘Q. How many incendiary fires, chief, did you have on that base, approximately?’

Then his answer was:

‘A. I would only be able to give an approximate estimate, but I would place it between twelve and fifteen incendiary fires.

‘Q. Was the officers’ club one of these fires?

‘A. That is correct.

‘Q. Did you report it as an incendiary fire?

‘A. Well, I endeavored to.

‘Q. What do you mean when you say you endeavored to?

“Now, the Court interrupted here and was wondering what this had to do with the case. Mr. Weymann made some objection and then finally the Court told me to go ahead.

‘Q. Were you requested to change your report, Chief Hensley? ‘A. That is correct.

‘Q. Who requested you to change your report?

‘A. Lieutenant Colonel Rau.

(Deposition of E. B. Hatcher.)

‘Q. Who is he?’

‘A. He was the Executive Officer to the air base, to the base commander.

‘Q. Who was the base commander?’

‘A. Colonel S. A. Gilkey.’

“Could they have had other incendiary fires than you would know about? ‘A. Oh, yes.

“Q. In other words, you would only know about them if you were called in for some reason or because that is Kern County you would be brought in, is that correct? ‘A. That is correct.

“Q. Is it true that there was a definite suspect who was an enlisted man on the air base and who, there was a good reason to believe, was the author of many incendiary fires? ‘A. There was.

“Q. Was this same suspect seen at the fires in the Lancaster area?

“A. Well, I might explain the answer to that question. As a result of an investigation of approximately five incendiary fires in the Lancaster area, and knowing to my own knowledge during that [347] investigation that there were three incendiary fires in the town of Mojave, and subsequent knowledge that there had been at least two suspicious fires on the base, to wit, the officers’ club and the non-commissioned officers’ club, a check was made as to the times and dates when these fires occurred and as a result of that check it was noticed that in each case the time of the fire was at an approximate time that it would take a person coming from either Lancaster or Mojave to the base, and also that the

(Deposition of E. B. Hatcher.)

fires were at a time when someone leaving Lancaster at the hours when we had had our fires would be on the base. In other words, the time element matched up. This resulted in a conclusion that we had either civilian or Air Force personnel as a possible suspect who was setting these fires on the way home after a 2:00 o'clock closing hour of the bars.

“As a result of that investigation we received permission from my superior, the captain of the detective bureau, to proceed to Kern County and particularly to Edwards Air Force Base and Mojave, for the purpose of getting additional information concerning the background of these reported suspicious fires. And this was done. It was done almost immediately after an incendiary fire which [348] occurred on January the 30th of 1948, at 4:20 a.m. at the Roosevelt Store in Roosevelt, which is slightly east and north of the town of Lancaster. And that fire was the final tie-in with the other series of fires which we had had in the immediate area.”

Continuing on the same page, line 19:

“Q. Mr. Hatcher, when did you first know the defendants in this case?

“A. Well, I was introduced to the defendants in this case, I believe, in the latter part of—I would say the latter part of 1947, probably sometime between July and September 1st of 1947, when another investigation took an officer from the Lancas-

(Deposition of E. B. Hatcher.)

ter Station to the area of the ranch in question in this case.

“Q. Did you go to the air base and make investigations there?

“A. I went to the air base to correlate for, concerning the fires on the base and to advise the commandant of that base that in our opinion there was personnel on the base responsible for the fire, and that I felt that the fire hazard of this type of individual and on such a base was of vital importance to the security of the base itself.

“Q. Did you get any cooperation from them? What was their attitude?

“A. Well, I might say this: That on the first two visits to the base I was unable to contact anyone in authority there. In other words, let's put it this way: I felt in my own mind that the problem which we had here deserved only the attention of the commandant or his executive officer, and I made three calls to the base, stating in brief my business to the gate officer in the provost marshal's office, at which time information supposedly was relayed to either the executive officer or the commandant, and each time I was refused admittance to see them. It was not until a third try after some telephone conversations by this defendant that I was admitted onto the base. However, after I was admitted to the base, they were very pleased to receive the information which I had to give them, and we made arrangements whereby further investigation would be correlated. But upon a subsequent return to the base

(Deposition of E. B. Hatcher.)

to get that information, I received no cooperation and to this date, other than—in other words, as far as I am concerned, the issue is closed with the later apprehension of the suspect in an attempt to set fire to the defendants' property, his arrest on a charge not of fire-setting, because it did not [350] go far enough to make that charge, and his subsequent transfer to the hospital, the Letterman General Hospital in San Francisco, and his further discharge as a schizophrenic under Section 8. But we are vitally interested in this man because of his pyromaniac tendencies and especially in view of the fact that this suspect now resides inside—in Palmdale in Los Angeles County, and also that I have received recent information through confidential sources that the suspect has——”

The Court: Did you say “suspect” or “subject”?

Mrs. Barnes: Yes, it is subject.

“——that the subject has tried on several occasions for further civilian work at Edwards as well as at Lockheed at the Palmdale Airport.

“We ran quite an extensive surveillance of this individual at the time when we had three incendiary fires in the Lancaster-Palmdale area, at a time when he was most likely to be active; to wit, when his wife was pregnant.

“In other words, for the purposes of this record I don't mind telling you that it is the opinion of

(Deposition of E. B. Hatcher.)

this person, of myself, that this man, in addition to being a schizophrenic is a very bad type of sexual pyromaniac. [351]

“Colonel Sacks: Sexual pyromaniac?

“The Witness: Now, there are a lot of people that do come under that heading, and, Colonel, I will be glad to discuss it with you later. In other words, where the motive for the setting of the fire is purely sexual, and it is a field which has recently been opened up and we have quite a bit of research on it. That is one of the reasons why I believe—and I am just bringing this out now—why at the recent fire which the defendant had on her property, there was a request by the Sheriff of Kern County for my assistance in the investigation of this last fire because of the knowledge I had of this suspect and the possibility that this suspect might have been the suspect that could have done any damage to the ranch of the defendant at this later fire. That investigation at the present time has not been completed. We are working in conjunction with the Kern County Fire Department and the Sheriff’s Office in Kern County in the investigation of that fire.

“Q. Mr. Hatcher, did you talk to the suspect in the Bakersfield Jail? “A. I did.

“Q. Did he have with him at the time of his arrest materials and all that is necessary to set a fire? [352] “A. He did.

“Q. Would that type of fire that he set be a delayed fire?

(Deposition of E. B. Hatcher.)

"A. It could have been if he had the knowledge for the delayed-action arrangement.

"Q. In your conversations with Colonel Rau and Colonel Gilkey at the air base, did they tell you that this man was a very intelligent man?

"A. They did.

"Q. Did they say that he could not possibly have been a suspect because of his great intelligence?

"A. I don't believe they made that statement.

"Q. Tell me what they did say.

"A. Well, briefly, they were greatly appalled that I picked on this individual. Subsequently quite a discussion was had after perusing his 201 File, and the particular thing that worried Colonel Gilkey was the fact that the boy was assigned with an unlimited pass to go over the base as the driver of the high-octane gasoline truck, from which I understand he was immediately removed. However, they not being familiar with—well, let's put it this way: Their not being familiar with sexual pyromaniacs and pyromania in general, they were at a loss to understand why a man of supposedly this high IQ and above-normal [353] intelligence which he had exhibited in his career in the Army would do such a thing as this. And I believe that I convinced them after further discussion that they still had a No. 1 suspect in this man, and as I say, subsequent action by the Army proved the case.

"To my knowledge, during his stay in Letterman General Hospital among other things he was given

(Deposition of E. B. Hatcher.)

the test by the doctors there with the use of sodium pentothal as a truth serum, under the influence of which he admitted three fires in Los Angeles County and two in Mojave in Kern County, but failed to say anything about the fires upon the base; and, of course, in my opinion, rightfully so in view of the fact that one of them in which personnel were lost would constitute a charge of murder. In view of the fact that this test is not admissible in court, no further action could be taken. Actually, in my own mind, I felt that they erred a little bit in not continuing the further interrogation on those lines, because I thought they had a number one suspect. I think, I still think he is a number one suspect.

"Q. Can you account for the lack of cooperation on the air base with myself and the Lancaster authorities which took place in that period before we [354] finally apprehended him at our hangar?

"A. I would have no way of knowing what that is attributable to.

"Q. Mr. Hatcher, do you remember how long the jail sentence was that this pyro received?

"A. I know, to my knowledge, that the charge at the time of his arrest and plea was set at six months. I also know that the sentence was modified as to the time served, but I don't know what the date was.

"Q. Mr. Hatcher, have you had occasion lately to drive from Rosamond to the defendants' property?
"A. I have.

(Deposition of E. B. Hatcher.)

“Q. Did you find that a new road had been cut into the old Kern County road?

“A. Well, there is a new road that makes a “Y” out of the old road that formerly went to your property, about halfway between your property and Rosamond.

“Q. Is it possible to drive on a straight paved road all the way to the ranch now, or is it necessary to turn out into the desert to get through that road?

“A. Well, at the point where the former road and running straight—if it is east—I don’t know the directions, probably mainly east—there is a [355] road larger than that road. I always knew it as the Rosamond-Muroc Road. At this point where the new road joins there are barricades erected showing the road to be closed from both directions and it is necessary to drive out on an apparently graded but very rough portion of sand to the south of the main old Muroc Road for approximately four-tenths of a mile, at which time you come back on the paved portion of the Rosamond-Muroc Road and go to the defendants’ property.

“Q. While you were up in that area the other day, Mr. Hatcher, I made a request of you, in that you were a witness who was going to testify here, to make a trip out to look at the mud mines on Rogers Dry Lake over at and on the air-base property. Did you do that? “A. I did.

“Q. There was testimony in court in Fresno wherein the Court himself asked Colonel Akers, who was the witness on the stand, if those mud

(Deposition of E. B. Hatcher.)

mines were operating, and Colonel Akers testified that they were not operating and had not been operating for some time. He further went on to say that any operation of the mud mines out on the lake there was simply filling in the holes where the mud mines [356] had been.

“Will you explain what you saw at the mud mines.

“A. Well, we went out in a car to the farthest east mud mine, went by and across the railroad tracks and came back nearer camp to the portion where some type of mill was in full operation. We went by the mill further to the west and went into the pit area, and from my observations at that time, why, they were doing nothing but taking dirt from the pit area, loading it into trucks and trucking it to the mill.

“Now, what that consists of, I am not familiar with the mud-mining operation, so I know nothing except what I saw. But in relation to this, there was no evidence to me that they were filling in any mud; they were digging the dirt out.

“Q. When did you see this, Mr. Hatcher?

“A. Last Wednesday. That would be the 18th.”

Mr. McKendry: That completes the deposition of Sergeant Hatcher.

Mr. Weymann: The same motion.

The Court: The same ruling; the Court will take it under advisement. [357]

* * * * *

EUGENE S. McKENDRY

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mrs. Barnes): Mr. McKendry, will you please state your full name?

A. Eugene S. McKendry.

Q. How do you spell that?

A. M-c-K-e-n-d-r-y.

Q. Your residence is located where?

A. At Muroc, California.

Q. What is your profession? A. Rancher.

Q. Are you a defendant in this case?

A. Yes.

Q. When were you first told that the Air Force intended to take our property?

A. Approximately November 1947.

Q. Who told you?

A. Colonel Gilkey, the commanding officer of Muroc Air Force Base.

Q. Did he tell you the property was necessary?

A. No. [361]

* * * * *

Q. (By Mrs. Barnes): Mr. McKendry, we have a case here in which we contend that the government is attempting to, or as has been set out have already taken our property. Do you consider—were you present at the time that appraisals were made of this property?

Mr. Weymann: I object to the form of the ques-

(Testimony of Eugene S. McKendry.)

tion, in the first place, and I object also to the question itself. Whether he was present at the time that the appraisals were made has no bearing on the determination to acquire this property under condemnation.

The Court: Read the question.

(The question was read.)

The Court: That is a preliminary question. You may answer that.

A. Yes.

Mrs. Barnes: Your Honor, in order to shorten the case I am not going to go through the various acts as when they tried to, you know, make so low an appraisal. I am going to ask of the only one of record.

Q. (By Mrs. Barnes): Mr. McKendry, were you present when Mr. Bernard Evans made his appraisal of the ranch? A. Yes. [364]

Q. Were you with him throughout the appraisal he made? A. The entire time, yes.

Q. Approximately what time did he arrive there at the ranch? Approximately? Did he work all of one day?

A. No, he arrived late in the morning of one day, left in the mid-afternoon, arrived a little earlier the following day, and left again in the mid-afternoon.

Q. The first day that he came, was he alone?

A. Yes.

Q. Was he alone the second day? A. No.

Q. He had a man helping him the second day?

(Testimony of Eugene S. McKendry.)

A. Yes. [365]

* * * * *

Q. (By Mrs. Barnes): Well, Mr. McKendry, did you go out to the mud mines? A. I did.

Q. Did you look at what they were doing?

A. Yes.

Q. Were you here in court on October 30th, I believe it was, and heard Colonel Akers tell his Honor in court that they were not operating?

A. Yes.

Q. Did you hear him tell then that they were just backfilling? A. Yes.

Q. When you looked at the mud mines, what did you see?

A. They were bulldozing up the mud in the bottom of the pits, loading that with draglines, and taking it to the mill for processing, all right on the dry lake.

Q. Was there backfilling going on?

A. No; they were taking out dirt. [368]

Q. Have you in the last several days been to the United States Army Engineers, the District Engineer's office in Los Angeles? A. Yes.

Q. Did you procure a bid to refill those mud mines? A. I did.

Mr. Weymann: That is objected to; it has no bearing on the issues in this case. We are not trying the question of the acquisition of the mud mines, we are trying the question of the good faith of the Secretary of the Air Force in determining that the Pancho Barnes property is required for the use of

(Testimony of Eugene S. McKendry.)

the Air Force. What is done with the mud mines, or any other property here is entirely irrelevant and immaterial.

The Court: Mrs. Barnes, the Court is inclined to sustain the objection. What have you to say?

Mrs. Barnes: Well, your Honor, I believe that the United States Government is discriminating against the defendants. In other words, I think this is a plain case of discrimination.

Also when you asked the question it must have at the time occurred to you it was a relevant question or you would not have asked Colonel Akers. In others words, they want to give us 30 to 60 days to move and yet they are operating a mud mine right in the path of the proposed runway. [369]

* * * * *

Q. (By Mrs. Barnes): Mr. McKendry, the government brought in certain maps which I believe were in evidence here, or for identification, which showed nine accidents in little green marks on the map, that had occurred they claimed on the air base.

You heard the testimony of Fire Chief Hemsley regarding those accidents, and I am going to ask you how many accidents, to your knowledge, happened on that lake that were classed as crashes.

A. In that four-year period testified to there were three. [371]

The Court: What is the answer? Three?

The Witness: Yes.

The Court: Any further questions?

(Testimony of Eugene S. McKendry.)

Q. (By Mrs. Barnes): Did you know the pilots that flew those ships? A. Yes, personally.

Q. How many of those pilots were killed?

A. One.

Q. Who was that?

A. Commander Wood.

Q. When did you talk to him previous to the accident?

A. The night before, I had dinner with him, and was also with him two nights before that.

Q. Was one of those accidents simply a taxi accident? A. Yes.

Q. Was it intended that aircraft should fly?

A. No.

Mr. Weymann: Just a moment. That is calling for the conclusion of the witness.

The Court: I think it does; objection sustained.

Q. (By Mrs. Barnes): Did you talk to the pilot in the aircraft? A. Yes.

Q. Then you know him well?

A. I knew him well. He was where I was [372] teaching flying.

Q. The third accident, the third crash landing or whatever it was, who had that?

A. Captain Yaeger.

Q. Do you know him? A. Very well.

Q. Are you sufficiently acquainted with all the test pilots, if there had been any other crashes would you be apt to know about it? A. Yes.

The Court: You said three?

(Testimony of Eugene S. McKendry.)

The Witness: Yes, sir.

Q. (By Mrs. Barnes): Did the defendants in this case use to have airlines using their airport as an intermediate stop?

Mr. Weymann: That is objected to as incompetent, irrelevant and immaterial; it has no bearing on the issue in this case.

The Court: Well, there has been some testimony in the depositions in regard to that. I think really the question is immaterial.

Mrs. Barnes: This is a bad faith case.

The Court: The testimony must be confined to bad faith.

Mrs. Barnes: I would like to make an offer of proof. When we have an adequate airport, as testified to by several [373] people, including Mr. Hook, who was head of the airports for the United States Government for the eleven Western States, and it was testified we did have these airlines running in and out of our airport; when the Air Base itself takes an airline from us that wants to use our landing field and has it land on the Air Base, bypassing us; when they find out later there are civilians that would like to use that airline and get off at our air field they are made an offer to land at the Air Force field, and then they stop them from using the airline, it is bad faith, your Honor.

We have an adequate airport, your Honor. There is an airport at Inyokern, the airlines run there and the Navy—the airlines used the civilian airport;

(Testimony of Eugene S. McKendry.)

they did not land on the secret base. But here they have sold tickets and they have had them land at Muroc, because they were trying to get us out of business, and they have tried to squeeze us out for years, rather than make a sort of gentlemen's proposition on the thing, your Honor.

The Court: Have you any further questions?

Mr. Weymann: I object, your Honor, to these private conferences with the witness.

The Court: They are both parties to the action.

Mr. Weymann: That puts the plaintiff under a disadvantage.

The Court: The Court will permit them to have a conference, if necessary. [374]

Mrs. Barnes: I think at this time, your Honor—I really hate to do this because you may not like it, but I would like to ask him questions pertaining to the differences between the maps that were in court September 9th and the maps in court October 27th. Would you have objection to him answering questions on that, or would you rather not hear about it?

Mr. Weymann: I think the Court has already determined that.

The Court: It is not what the Court wants. If you think it is a proper question, you may ask it, but it seems to me,—The Court will not make any statement. You proceed in your own way.

Q. (By Mrs. Barnes): Mr. McKendry, this is a case of bad faith. Did you see the maps brought

(Testimony of Eugene S. McKendry.)
into court by the government on September 9th?

A. Yes.

Q. Who produced those maps?

A. Colonel Akers produced the maps while on the stand.

The Court: Well, the government produced the maps, as I recall it.

Mr. Weymann: That is correct.

Mrs. Barnes: According to the transcript, your Honor, and according to the argument as I remember it and as [375] Mr. McKendry remembers it, the government did not produce the maps. Colonel Akers had them with him and produced them.

The Court: He was a witness on behalf of the government.

Mrs. Barnes: Yes. Colonel Akers produced the maps. Did he say he prepared those maps?

The Court: Well, we have the transcript on that, if you want to refer to it. It would be better than Mr. McKendry's testimony, but I recall, I think there were two maps.

Mr. Weymann: Three.

The Court: Might have been three maps, and they were presented here by the witness for the government, so you may examine in regard to those.

Q. (By Mrs. Barnes): Did you observe those maps closely? A. Yes.

Q. Do you remember a statement by Mr. Weymann regarding that particular map?

A. Yes.

(Testimony of Eugene S. McKendry.)

Q. What did he say he was going to prove to the Court?

A. That the defendants' property was in the very center of the Edwards Air Force Base.

Q. Did the maps at that time show the defendants' property in the approximate, very center of the base? A. Yes.

Q. Did the maps at that time show the high altitude [376] speed course running slightly north of the defendants' property but extending exactly over the town of Rosamond? A. Yes.

Q. Did those maps at that time show some extended paddles of flight patterns?

A. They showed three paddles only.

Q. There were no more than three paddles on the first map? A. That is correct.

Q. Did those paddles practically converge on the defendants' property?

A. All three converged on the defendants' property.

Q. Did the original maps you saw on September 9th include the towns of Mojave and Lancaster?

A. No, they did not show them whatsoever.

Q. Did the maps that were here on September 9th show, where the spots on the lake are, were they grouped in a more round or buckshot pattern than the later ones? A. Yes.

The Court: First, I want to ask Mr. Eiland: Are there three maps in evidence in this proceeding now?

(Testimony of Eugene S. McKendry.)

The Clerk: I believe there were three here, supposed to be. Three maps at least, or more than that.

Mrs. Barnes: The three I am referring to, I think.

The Court: I just wanted to know if they are in [377] evidence. Mr. Weymann offered them in evidence at one time and I said I didn't believe it was necessary; but they are in evidence now, are they, Mr. Eiland?

The Clerk: Yes, if these are the maps, they are in evidence. If those are the three maps, each one of those is in evidence.

The Court: I just wanted to be sure they are in evidence.

The Witness: They are in evidence; I checked.

The Court: Mr. McKendry says he checked. Have you any further questions?

Mrs. Barnes: Yes, as long as we have them out I would like to show them to Mr. McKendry.

The Court: I think you have inquired about the maps.

Mrs. Barnes: There is one question.

The Court: You go ahead; ask any question you want.

Q. (By Mrs. Barnes): The original maps on September 9th, did they show the defendants' property approximately in the center of the maps, as drawn? A. Yes.

Q. About how far east did those maps extend?

A. The map extended only to the east edge of Muroc Dry Lake.

(Testimony of Eugene S. McKendry.)

Q. Now, on October 27th were three maps produced in court? [378] A. Yes.

Q. Would you say those were the same maps?

A. No, they are not the same maps.

Q. Did they show a larger extent of territory?

A. Yes, they showed the present air base and the proposed air base also, while the one on September 9th did not show even all the present air base. The ones on October 27th extended another twenty, thirty miles east of Muroc Dry Lake, which the other did not show.

Q. Thereby being a considerable increase in the number of paddles shown on flights?

A. Yes, September 9th showed three runways only, and the October 27th map showed eight runways with sixteen paddles.

Q. Did the high altitude speed course show on the October 27th maps at the same place that it showed on the ones of September 9th?

A. No, it had been changed so that the straight line of the speed course did not go directly over Rosamond, just the circle, the dumbbell portion, while on September 9th the line went directly over Rosamond.

The Court: If you are finished with this witness, the Court is prepared to make an order in regard to the supplemental amendments that were offered today. Have you finished with Mr. McKendry?

Mrs. Barnes: If you want me to be. [379]

* * * * *

The Court: Mr. Eiland, the Court will permit the supplemental amendments, one amendment to the motion to dismiss, and one amendment to motion to set aside declaration of taking and to vacate and set aside ex parte judgment, to be filed. They have been lodged heretofore; let them be filed.

The Clerk: Yes.

The Court: The Court will take a recess until ten o'clock tomorrow morning. [380]

The Clerk: This is a motion to strike. This is the one argued by Mr. Weymann this morning. He gave it to me.

The Court: These are the originals. These are the ones I order filed, the originals of the supplemental amendment to the motion to dismiss, and of the supplemental amendment to motion to set aside declaration of taking and to vacate and set aside ex parte judgment. Let those be filed. [381]

* * * * *

Wednesday, February 24, 1954. 10:00 A.M.

* * * * *

EUGENE S. McKENDRY

resumed the stand as a witness on behalf of the defendants, [383] and having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mrs. Barnes): Mr. McKendry, did you carefully observe the three maps that were in court on September 9th? A. I did.

(Testimony of Eugene S. McKendry.)

Q. Did any of those maps extend very far beyond the east side of Rogers Dry Lake?

A. No.

Q. Did the maps in court on September 9th have the word "enclosure" spelled with an "e"?

A. Yes.

Q. Have the present exhibits in court the word "enclosure" spelled with an "e"?

A. No.

Q. How is it spelled? A. With an "i."

Q. Did the original maps in court on September 9th show three paddles converging on the defendants' property? A. Yes.

Q. Were those three projected runways shown on the maps runways all in use? A. No.

Q. Were there any other paddles besides the three [384] paddles as referred to, the fans, on the maps that were in court on September 9th?

A. No, there were only three.

Q. In the present maps in court, how many runways do they show? A. Eight.

Q. How many paddles do they show?

A. Sixteen.

Q. On the original maps in court, did they show the towns of Mojave, Lancaster and Rosamond?

The Court: You have asked that. It is not.

Mrs. Barnes: That is correct, your Honor. It is not. [385]

* * * * *

(Testimony of Eugene S. McKendry.)

Q. (By Mrs. Barnes): Mr. McKendry, on the original three maps in court, which showed nine little green dots on the lake bed and nine pink dots over the defendants' property, that had—what do you call it on the maps, the symbol——

The Court: Legend.

Mrs. Barnes: Yes.

Q. On September 9th, what did that call them?

A. On the enclosure and also in the transcript from Colonel Akers it was noted as crash pattern two different times.

The Court: Miss Schulke, will you read that answer?

(The answer was read.)

Q. (By Mrs. Barnes): On the maps that came in on October 27th what was the legend regarding these same dots?

The Court: Well, those maps are in evidence?

Mrs. Barnes: Yes. [387]

The Court: Then you may refer to the maps.

Mrs. Barnes: The maps that are in evidence, your Honor——

The Court: The maps speak for themselves. You do not need to question in regard to that. The maps are in evidence and they speak for themselves.

Mrs. Barnes: I don't have to ask?

The Court: No.

Mrs. Barnes: Very well.

Q. Mr. McKendry, do you recall a conversation that took place between yourself and myself

(Testimony of Eugene S. McKendry.)

and Mr. Weymann in his office regarding these maps in court on September 9th?

The Court: When did that occur?

Mrs. Barnes: About——

The Witness: Approximately four to five days after the hearing on September 9th.

Q. (By Mrs. Barnes): Do you remember that conversation? A. I do.

Q. Will you please repeat the substance of that conversation?

A. You asked Mr. Weymann if he would stipulate to have the same maps back at the October 22nd hearing, and he said no, we would never see those maps again. [388]

* * * * *

Mrs. Barnes: Here is another publication, your Honor, which is the specifications for the back fill of the mud mines of Edwards Air Force Base, and relates to them and gives the dates and is a public document put out by the Engineers. They are here, the maps and specifications of the entire project. And the three things this shows are: that the mud mines are still in operation, will be in operation un-September 24th of this year, that the buildings will not be removed until January 1955.

Mr. Weymann: May I interrupt at this point?

The Court: Let her make her offer, and then you may object.

Mrs. Barnes: That the completion of this bid is called for approximately June 1955.

The Court: Have you finished?

Mrs. Barnes: Yes.

The Court: You may make your statement.

Mr. Weymann: Now, I move to strike out the statements [394] made by the defendant here with respect to the Mojave mud mine. This matter was gone into yesterday. The Court ruled on it, and sustained plaintiff's objection to the materiality of it. This is not a matter which has anything to do with the defendants' property. The matter was gone into yesterday and the Court rejected it.

The Court: No, I think the Court received some testimony in regard to the mud mine.

Mr. Weymann: That there were bids received on it?

The Court: In any event, it may be marked for identification as Mrs. Barnes' exhibit next in order.

The Clerk: The first will be Exhibit 12, and this will be exhibit 13, both for identification.

The Court: For identification, yes.

The Clerk: Yes.

(The document referred to was marked as Defendants' Exhibit No. 13, for identification.)

Mrs. Barnes: This is part of the same document, Mr. Eiland. They go together. That is the specifications in the book, and these are the maps. Those go with the book.

The Court: You offer all those maps?

Mrs. Barnes: If your Honor does not want me to offer the maps. They really do not do any good, except that is the way it comes from the government. I might be wrong in presenting only a part when this whole thing is given by [395] the Engi-

neers. This has the whole maps of the mud mines. Might as well put it in, it might be handy around the court.

The Court: Let it be marked Defendants' Exhibit 14 for identification; that is those maps that are in the big roll on the clerk's desk.

(The maps referred to were marked as Defendants' Exhibit No. 14 for identification.)

* * * * *

Mrs. Barnes: I would like to make a motion all exhibits marked for identification be taken into evidence so I may not miss them and be able to refer to them should this case go to appeal.

Mr. Weymann: That is objected to. It is entirely indefinite. What exhibits?

Mrs. Barnes: I would be glad to enumerate the exhibits.

The Court: There are not very many. You may do that, if you wish.

Mrs. Barnes: That will take a little time. [397]

The Court: You may do it right now.

Mrs. Barnes: We already have in evidence the joint exhibits, which are the maps.

The Court: Just those not in evidence.

Mrs. Barnes: Not in evidence.

The Court: Marked for identification.

Mrs. Barnes: I want—these are noted.

The Court: I will tell you, you may do that at a later time. You make a note of each one that is marked for identification only, and then present it at a later time.

Mrs. Barnes: There are only eleven exhibits

altogether, including the last I put in — fourteen, and I would like to move 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 be taken in.

The Court: Aren't any of those in evidence?

Mrs. Barnes: No, all you took was the government's maps, and you did take the transcript of October 9th, the day that we were talking about the maps. You took that transcript I offered into evidence.

The Court: What number is that?

Mrs. Barnes: Number 5.

The Court: Then you want 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 in?

Mrs. Barnes: Yes.

The Clerk: 2, 3 and 4 are in. [398]

Mrs. Barnes: Those are joint exhibits. So it is 1, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

The Court: Well, the motion is denied. [399]

* * * * *

AUGUST WEYMANN

a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [412]

* * * * *

Cross Examination * * * * *

The Court: Now, you offer the maps. Get the defendants' exhibits.

Mrs. Barnes: That would be Defendants' Exhibit 7, that is the Coast and Geodetic Survey map, and——

The Witness: May I ask, your Honor, if the defendant is through with the cross examination?

(Testimony of August Weymann.)

The Court: No, she is now contemplating asking the Court to reconsider the offer of the maps.

Q. (By Mrs. Barnes): Can you see this map, or would you like to look at it closer? I mean, it is very small print here.

A. I think that was the map that you offered in evidence at a previous hearing.

The Court: What is that marking on it, Mrs. Barnes?

Mrs. Barnes: Which mark?

The Court: The number.

Mrs. Barnes: It is marked, for identification, it is Exhibit No. 7.

The Court: I recall the map, but I don't remember testimony. [418]

Mrs. Barnes: There were several testimonies, which I would like to argue on the map, your Honor, because it is quite interesting, but right now Mr. Weymann has given a reason for taking exception to this map business.

The Court: The Court wants to consider the offer. I have forgotten the testimony which identified the map.

Mrs. Barnes: Colonel Miller testified to this map throughout his testimony.

The Court: Do you have the transcript at this point?

Mrs. Barnes: Yes, I do.

The Court: May I see it, please?

(Document handed to Court.)

The Court: Well, after the ruling of the Court

(Testimony of August Weymann.)

sustaining the objection many questions were asked the witness concerning the map. The Court will now set aside that ruling, and order that the map be received in evidence.

Mr. Weymann: Before the Court rules, I would like to make an objection, that it is improper cross examination of myself as a witness. I testified as to nothing regarding that map.

The Court: That is all right, Mr. Weymann.

(The map referred to, heretofore marked Defendants' Exhibit 7 for identification, was received in evidence.) [419]

* * * *

Wednesday, February 24, 1954, 2:30 p.m.

The Court: Mr. Eiland, may I see Exhibit 8 offered by Mrs. Barnes?

You may proceed, Mrs. Barnes. I think you were about to offer Exhibits 6 and 8, that were marked for identification. That includes the two maps.

Mrs. Barnes: It wasn't 8 I mentioned, your Honor. I mentioned 6. Now, I have in my case, the most important part of my case is the motion to set aside the declaration of taking, and in a way it is my weakest case, because I did not bring in appraisers or anything to try to prove value, but in the supplemental motion——

The Court: You make your offer in regard to what?

Mrs. Barnes: I would like to put in Exhibit 10.

The Court: No, I think it was 6.

Mrs. Barnes: I would like to have that in also.

The Court: Number 6 may go in. I have examined a copy of the transcript that has been presented to the Court by Miss Schulke, and there were several pages of examination prior to the Court's order that it be marked for identification; and it may be received in evidence.

(The document heretofore marked Defendants' Exhibit No. 6 for identification, was received in evidence.)

Mrs. Barnes: Now, Number 9 are pictures of the [434] defendants' property, and there is a prima facie showing there.

The Court: May I see those, Mr. Eiland?

Mrs. Barnes: It is all those pictures, your Honor.

Mr. Weymann stipulated that they were pictures of the defendants' property, and I, in one of the depositions, had the man that took them testify, but because it was stipulated I did not waste our time bringing that in.

The Court: These are the pictures?

Mrs. Barnes: That shows the defendants' property, and I need it very badly.

The Court: What is the number of it? What exhibit is it?

Mrs. Barnes: It is Exhibit 9 for identification, your Honor. It was towards——

The Court: I will find it. Let me see those pictures again. (Examining.)

Mrs. Barnes, what were you about to say regarding this offer?

Mrs. Barnes: That I am trying to establish a

prima facie case, that the estimation of the estimated compensation was not made in good faith, and I am trying to show visually and through the figures that \$205,000 could not possibly be enough to reestablish one's self in the manner that is there on the place, or in other words even begin to. And I think the pictures are necessary, especially if I should have to appeal, your Honor, because I have very little to [435] show in the declaration of taking, the motion to set aside.

The Court: The Court will take under consideration this offer.

It seems to me the question of value should not be considered at this time, but the Court will consider your offer.

Mr. Weymann: May my objection to the offer be noted at this time, because I do not believe the issue is before the Court.

The Court: You said, "I will stipulate that these are pictures of the defendants' property, but I will not stipulate that they may be received at this time, because that goes entirely to the question of value, and this is neither the time nor place to determine that."

Mr. Weymann: That is correct.

The Court: That is your objection, and the offer has been made, and the Court will rule upon it at a later time. [436]

* * * * *

Mrs. Barnes: Another thing, regarding the same declaration of taking, there is a document, identification No. 10, exhibit for identification, which is

a deed, which shows 240 acres, part of which is located within three-quarters of a mile of the defendants' property, and all within a mile and a half of the defendants' property. This 240 acres, it was testified to in court, your Honor, was barren desert land, but the government paid \$593,500 for that land, and that deed is of record, and we have a photostat here as an exhibit. And yet they only offered \$205,000 for 360 acres of land, which was very, very highly improved. Now, I feel that is a discrimination and showing of bad faith, where they go out and pay——

The Court: What number exhibit is that?

Mrs. Barnes: That is 10 for identification. I think it is very important, because this part of my case, I think, is the most important of all.

The Court: Well, the Court will likewise consider this offer to have it introduced in evidence.

Mrs. Barnes: If it will help any, I don't know about such things legally, but if it will help I also brought that into the supplemental amendment that was accepted by your Honor yesterday, as a supplemental amendment to the original motion to set aside the declaration of taking, and it is [439] mentioned of record in that motion, so that it would tie in. And I think it is quite necessary, your Honor.

The other thing that I think that we should have on view is the public documents of the Engineers' office in allowing the bid specifications. That comes in this motion to dismiss the case, where it shows

that the bids will not be completed until June nineteen——

The Court: Wait just a second until I get that. What reference is that?

Mrs. Barnes: That is identification Exhibit 13, for identification. It is the bids, the specifications for the mud mines. In other words, it was testified in front of your Honor, at your Honor's request to know about those mud mines, because they are relatively the same distance on the other end of the runway, they are also in the center of the mud lake runway, and the government tried to say they needed my place because I should not be there at the same time that these other things were. These show the bids, they are not going to come in until March 18th, and it shows in the bids, it says so right in them, that the mud mines are still operating and will operate until September 1954, that the buildings and plants, and so forth, of the Mojave Clay Corporation will not be removed until January 1955.

The Court: Well, you made that statement before. The [440] Court will consider that motion.

Mrs. Barnes: Yes, your Honor. Can we have the identification number 13 accepted in evidence?

The Court: The Court will consider that offer.

Mrs. Barnes: Thank you, your Honor. [441]

* * * * *

Thursday, February 25, 1954. 10:30 a.m.

* * * * * [445]

The Court: At this point it occurred to the Court there were certain motions made by Mr.

Weymann as to the depositions, and those motions are all denied. They may be received in evidence.

Mrs. Barnes: The whole thing?

The Court: The depositions of Mr. Koch, Mr. Hodges, and the others that were received.

There was a motion to strike them all, and the motion is denied. [459]

* * * * *

[Endorsed]: Filed April 13, 1954.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Fresno, California, June 16, 1955. 10:30 a.m.

Honorable Gilbert H. Jertberg, Judge presiding.

Appearances: For the Plaintiff: Laughlin E. Waters, United States Attorney, by Joseph F. McPherson, Assistant United States Attorney. For the Defendants: Pancho Barnes, In pro per.

* * * * *

Miss Barnes: May I please see the document for which you personally were subpoenaed?

Mr. McPherson: In order to help and shorten the Court's time, I have prepared, or had Mr. Lavine prepare from the file, an affidavit identifying the photostatic copies which are attached thereto, of all of the documents which appear in the Lands Division file, bearing upon the declaration of taking and the manner in which it was filed in this proceeding, and I now hand your Honor the original of Mr. Lavine's affidavit, with the 14 docu-

ments attached to it, and I have given Miss Barnes a copy of it.

For the record, one of the documents which came to us as an enclosure is itself a photostat and did not print very legibly there, and if it is agreeable, I will be very happy to have your reporter transcribe it from our file. It is legible in our file, but it did not make a very legible photostat.

Miss Barnes: Which one is that? [54]

Mr. McPherson: It is the second document, the one attached to the District Engineer's letter of April 8, 1952, the letter to the Division Engineer signed by W. R. Shuler, which bears date December 4, 1952. The copy in my file is itself a photostat and it did not reproduce with clarity. [55]

* * * * *

WILLIAM M. CURRAN, JR.

called as a witness in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: William M. Curran, Jr.

The Clerk: Have that seat there.

Miss Barnes: Your Honor, I would like to especially call your attention to dates. In other words, the chronological order of dates in review to documents is important.

Mr. Eiland, will you produce the original of the declaration of taking in the file?

Thank you very much. [58]

(Testimony of William M. Curran, Jr.)

Direct Examination

Q. (By Miss Barnes): Mr. Curran, you have there, I believe, a telegram you were showing me a moment ago?

The Court: May I find out, coming new into the case, who Mr. Curran is?

Miss Barnes: Oh, pardon me, your Honor.

The Court: What his qualifications are.

Miss Barnes: Mr. Curran, will you state your name?

The Court: Would you please stand over there so the witness will speak up and we can all hear him?

The Witness: William M. Curran, Jr.

Q. (By Miss Barnes): And Mr. Curran, who are you employed by?

A. Corps of Engineers, U. S. Army, at Los Angeles.

Q. Are you an attorney? A. I am.

Q. Do you do legal work for the Corps of Engineers? A. I do.

Q. Do you as a rule prepare legal papers for the Corps of Engineers? A. I do.

Q. Do you on occasion make upon the declaration of taking in land cases for the Corps of Engineers? A. I do. [59]

Miss Barnes: Is there anything further, your Honor, you would like to know about the witness?

The Court: How long have you been employed, Mr. Curran?

The Witness: Approximately eleven years.

(Testimony of William M. Curran, Jr.)

Miss Barnes: Where is the telegram? Mr. McPherson, have you seen this exhibit?

Mr. McPherson: No, I have not seen the exhibits you subpoenaed from Mr. Curran. This is No. 6, bearing cancellation stamp December 1, 1952, is that the one you refer to?

Miss Barnes: Now, your Honor, some of those figures there are a little unintelligible to me because it is coded, you know—not necessarily a code, but I mean they have certain code initials, but if you would wish an explanation of them more clearly for what you don't understand would you ask Mr. Curran?

The Court: Well, I would prefer to have the witness read the telegram into the record.

Would you read the telegram into the record, and then such explanation, if there are code letters used, as to make the telegram intelligible to the average person?

The Witness: This is a teletype received from the South Pacific Division Engineer at San Francisco to the District Engineer, Los Angeles. From SPDR 0719 message

“Chief of Engineers ENGLP 2336 dated 28 November 1952.

Quote Reference your letter 7 November 52 concerning [60] Pancho Barnes McKendry property, Edwards Air Force Base, California. If option cannot be obtained submit condemnation with declaration of taking unquote.”

(Testimony of William M. Curran, Jr.)

Q. (By Miss Barnes): What was the date of that? The date of the wire?

The Court: I have November 20, 1952.

Miss Barnes: December 2nd.

The Witness: The date it was received, your Honor, was December 1, 1952.

Mr. McPherson: That is quoting the chief's wire, the November date.

The Witness: Yes.

Miss Barnes: December 1, 1952. Is that the correct date?

The Witness: That is the date it was received in Los Angeles.

Miss Barnes: In Los Angeles?

The Witness: Yes.

The Court: In view of the fact that the telegram has been read into the record is it necessary to have it as an exhibit in this case?

Miss Barnes: It might be, your Honor, because this case might go to appeal to the Ninth Circuit, and I believe, I am not quite clear about all these things, but I believe if in the extreme case that your Honor should not grant the [61] defendants' motion, then this case should go to condemnation trial, it might not be necessary to bring up these motions again at the time of the condemnation trial. Maybe your Honor can answer that question, and the appeal could be as from these other motions, which I made once and the appeals court said were premature at the time but they could be made later. Now, this particular case now could

(Testimony of William M. Curran, Jr.)

go to the appeals court, is that right, your Honor?

The Court: Well, I wouldn't want to advise you on the law concerning procedure.

Miss Barnes: Well, it seems unnecessary to keep going through these various motions.

The Court: The Court has indicated that certain other appeals that you did take were premature, as I understand it, and some of the problems that you raised on the appeal could be reviewed in an appeal from the final judgment.

Miss Barnes: Therefore, I do think we need these exhibits in the record.

The Court: I want to ask Mr. Curran, do you have copies of those documents?

The Witness: This is our file copy, your Honor.

The Court: That is your file copy. You have no other copy?

The Witness: There would be no other copy. It is nearly 18 months later and all of the machine copies would [62] be destroyed by this time. They are only retained six months.

Miss Barnes: Your Honor, can I make the suggestion that it is quite all right that photostats or proper certified copies be made of these records and returned to the Engineers' file, but I would like to have this particular one in the evidence.

The Court: Well, what would be the number of this exhibit, Mr. Eiland? Do we start a new series of numbers?

The Clerk: I believe that would be the best way

(Testimony of William M. Curran, Jr.)

to keep track of them, to start a new series of numbers on this hearing.

The Court: This telegram will be received and marked Defendants' Exhibit A for this hearing of these motions. And if you can substitute true copies of the telegram, then this one might be removed and returned to you.

(The document referred to was marked as Defendants' Exhibit A, and was received in evidence.)

The Witness: All right.

Miss Barnes: Now, your Honor, these various dates are going to come up from time to time, but I wish to bring in the declaration of taking now. This is the original.

Q. Mr. Curran, did you make that particular paper?

A. Yes, up to the point of the changes and insertions that were made.

Q. Did you make any changes on that paper?

A. I did not. [63]

Q. When you made that original paper, can you see what it would have read? Would it have been 1710.73 acres of land?

A. I think so.

Q. In other words, that particular case is the same description as the case entitled 1201-ND, is that correct to the best of your knowledge?

A. Yes. As far as I know; that is my recollection.

The Court: It is difficult for me to hear the witness and that is particularly true when——

(Testimony of William M. Curran, Jr.)

Miss Barnes: Your Honor, I know it is hard, but I am looking at the paper too. I know it by heart, I shouldn't have to look at it.

The Court: Will you read that question?

(The question was read.)

The Witness: Yes, as far as I know the title of the action shown on this declaration of taking is the same as that shown on 1201-ND.

Q. (By Miss Barnes): Mr. Curran, do you know who made the changes on that paper?

A. I do not know.

Q. It was made after it left the Engineers?

A. Yes.

Q. After it left your office? [64]

A. Yes.

Q. Now, Mr. Curran, will you observe in the right hand upper corner of that paper, the markings? Will you read them? A. WMC/VE.

Q. And the date?

A. Date of 11-24-52, November 24, 1952.

Q. Yes. Now, this declaration of taking then was dictated by you to the secretary?

A. It was.

Q. And what was your secretary's name?

A. Venice Eason.

Q. Is she still your secretary? A. She is.

Q. Now, observing the second page, do you see any x-es on there? A. Yes, on line 17.

Q. Do you also see on line 17 the words "part of the lands described"? A. I do.

Q. Would you think that applies to the subject

(Testimony of William M. Curran, Jr.)

property of the defendants, as you know it?

A. I don't know. I don't understand that question.

Q. Well, I don't think it is necessary that I get that particular point from you. Do you happen to be conversant with these tract numbers in these tracts? [65]

A. I am.

Q. Do you know whether they total 360 acres, more or less? A. Yes, they do.

Q. Well, in Schedule A then, with a totaling of the tracts this document where it makes the remark "part of the lands" would actually not apply to the document, would it?

Mr. McPherson: That is argumentative, your Honor.

The Court: Yes, I think it is argumentative.

Miss Barnes: Well, I am asking him if——

The Court: Well, I will overrule the objection, but I think the question is argumentative, but if you can answer the question, Mr. Curran, do so.

Mr. Curran: It calls for an opinion, your Honor. It appears to be bad English or inept phrasing.

Q. (By Miss Barnes): Now, Mr. Curran, I understood you to say that you usually made up these declaration of taking papers to forward on through the channels? A. That is correct.

Q. In other words, you have made more than this, many others; is that correct? A. Yes.

Q. This paper here started off to be evidently a declaration of taking No. 2 in a civil case, the [66]

(Testimony of William M. Curran, Jr.)

number of which was 1201-ND. How many declarations of taking No. 2 have you made? Is that an ordinary way of making them?

A. Sometimes yes, and sometimes no.

Q. Can you name me a case in the Muroc area that has had a declaration of taking No. 2?

A. I don't recall offhand.

Q. Do you believe there were any?

A. I don't recall.

Miss Barnes: If you will pardon me a moment, I would like to consult with my co-defendant, your Honor.

The Court: Yes, indeed.

Miss Barnes: This is one thing Mr. McKendry called to my attention, had your Honor personally seen this copy, because it may be that the Judge's copy is not the same.

The Court: Well, the witness has been interrogated concerning decree on declaration of taking in 1253-ND, is that right?

Miss Barnes: Yes.

The Court: Then it states United States of America vs. 360 Acres of Land.

The Witness: No, your Honor, not the decree; the declaration of taking itself.

Miss Barnes: That is correct. That is the declaration of taking, not a decree, your Honor. That is the one.

The Court: Well, all right. Then the witness [67] has been examined by Mrs. Barnes on the declaration of taking in Civil No. 1253-ND.

(Testimony of William M. Curran, Jr.)

The Witness: Yes, your Honor.

The Court: And, now, as I understand your testimony were the changes that appear in the document made by you?

The Witness: They were not.

The Court: They were not. And you don't know who made them?

The Witness: I do not.

The Court: Or when they were made?

The Witness: After they left my office.

The Court: After they left your office.

Q. (By Miss Barnes): Now, Mr. Curran, did you ever send the declaration of taking back through channels? I am never quite sure of these various channels they go through. And was that ever sent back to you and they asked you to make it over?

A. Yes, on one or two occasions.

Q. In other words, if there was something wrong with one that you sent back, would the normal procedure be that those changes would be made by you in your office?

Mr. McPherson: That calls for a conclusion on a matter on which the witness is not shown to be qualified.

The Court: Well, I believe, Mrs. Barnes, he wouldn't be aware, as I understand it, of any [68] changes that may have been made and not returned to him.

Miss Barnes: The point that I am trying to make, your Honor, is that if they weren't satisfied

(Testimony of William M. Curran, Jr.)

with the declaration of taking as made by him in his job, that I understand they were sent back, as he has just so testified, in cases. Maybe not in every case, definitely certainly not in this case, but the usual manner of procedure. You see, we get so much of the usual manner of procedure from the government maybe I am falling into that line, but they say this is the way we do it. So if it were sent back to him in other cases, it is rather interesting if it were not sent back in this case.

The Court: Well, as I understood the testimony of the witness, he said there have been occasions on which documents which you prepared have been returned to you for change.

The Witness: Yes, sir.

Q. (By Miss Barnes): Was this document referred to you for change?

A. No, it was not.

Q. Now, you have read the telegram which was your authority for it?

The Court: You are talking about Exhibit A, Defendants' Exhibit A?

Miss Barnes: Yes.

Q. That was your authority in case a [69] condemnation—that is, negotiations couldn't be made, to submit a condemnation with declaration of taking; is that correct? A. That is right.

Q. It is interesting to me, can you explain to me why this telegram is received by you at a later date when negotiations are still talked about than when you made, according to your testimony, the

(Testimony of William M. Curran, Jr.)

declaration of taking which is in the case? Do you understand the question, your Honor?

The Court: Well, I think I do. It seems to me that your question consists of statements and opinions and what-not,—

Miss Barnes: No, I asked him—

The Court: But what you want to know, if he knows why the declaration of taking is dated prior to the date of the telegram, Exhibit A.

Miss Barnes: Yes.

The Court: Is that true?

Miss Barnes: Yes.

The Court: Can you answer that question?

The Witness: I don't know just why. It could have been that we had an earlier telephone call to one of my superiors who instructed me to commence preparation of the declaration of taking, and the authority would come in later.

The Court: Has that happened?

The Witness: That has happened very often; [70] teletype transmission is somewhat slow.

Q. (By Miss Barnes): Now, Mr. Curran, as long as this telegram was quite explicit, which you have here, regarding the Pancho Barnes McKendry property, can you explain, and also this shifting of dates as a possible phone call, but the telegram itself being received after this declaration of taking was made which you sent out? Can you explain that situation?

The Court: Mrs. Barnes, I don't think that you

(Testimony of William M. Curran, Jr.)

should precede your questions with a long statement.

Miss Barnes: I don't think I should, your Honor, it is just my stupidity.

The Court: Well, I am not sure of that, but if you have a particular point in mind, I would prefer if you would ask the witness the question without any prefatory statement or argument.

Miss Barnes: I know.

The Court: All right. Can you boil down that statement into a simple question?

Q. (By Miss Barnes): As I see this telegram it is quite explicit regarding the Barnes McKendry property? Is that correct, Mr. Curran?

A. That is correct.

Q. And yet when you sent the declaration of [71] taking out, it had nothing to do with the Barnes McKendry property at all. [72]

* * * * *

Q. Would you know, or would you not know, whether or not that declaration of taking was meant for the Pancho Barnes McKendry property?

A. It was intended and meant for the Pancho Barnes property, as I prepared it.

Q. That was your intention at the time you prepared it? A. Yes.

Q. Now, can you show me anything else backing that up, or is there any correspondence that goes with it?

Mr. McPherson: That is vague, ambiguous and indefinite.

(Testimony of William M. Curran, Jr.)

The Witness: The first part of the question, your Honor, I can answer. The declaration of taking consists of the first three pages, the last of which was signed by the Secretary, and the accompanying schedules, Schedule A and Schedule B, the latter two specifically refer to and contain the description of the Barnes property. [74]

The Court: We will take a short recess at this time.

(A short recess was taken.)

Miss Barnes: Well, let's proceed with another paper. We have Public Law 165 which was the public law and the only—564, correction.

The Court: I think we can proceed, Mrs. Barnes.

Q. (By Mrs. Barnes): Mr. Curran, do you have a letter there from an authority for the subject property, for the matter of appraisal on condemnation? Anything relating to the subject property under Public Law 564?

A. I have the real estate directive which was received by our office.

Q. Is that the letter signed by General Colby Myers?

A. That is one of the attachments. What we received is a copy, a carbon copy of a letter signed by General Myers.

Miss Barnes: I think that these exhibits should be in the record, or read into the record, and I would like his Honor, the Judge to see these. It might be difficult for him to immediately get what I am driving at.

(Testimony of William M. Curran, Jr.)

The Witness: They commence 1, 2, 3, 4.

Miss Barnes: Your Honor, would you like to see these papers?

The Court: Well, I would be glad to look at them. Are they papers such as can be read into the record? [75]

Miss Barnes: Yes, I think they should be read into the record.

The Court: And they come from your file?

The Witness: They are in the official files in our office.

Q. (By Miss Barnes): Will you please, Mr. Curran, read this letter of April 29, 1952, signed by—this is the one signed by Mr. E. V. Huggins, Assistant Secretary of Air.

A. That is right.

The Witness: If I might interject, your Honor, there are available here today certified copies of the original signed letter.

The Court: Where are they?

The Witness: Mr. McPherson has those letters.

The Court: Do you have certified copies of the original letter to which the witness has referred?

Mr. McPherson: I have some here.

The Witness: I believe Colonel Wells has them.

Mr. McPherson: These are all the documents Miss Barnes subpoenaed.

The Witness: Mine are just carbon copies.

The Court: Well, it would be much better to get the photostat of the original documents.

(Mr. McPherson hands up papers.) [76]

(Testimony of William M. Curran, Jr.)

Miss Barnes: May I ask, are these all the same, these copies?

The Witness: No, there are two sets. There is one group that is a photostat of this one, and the other group a photostat of that.

Mr. McPherson: "This one" isn't going to be very intelligent in the record, unless you identify them.

Miss Barnes: Well, let's see what we are looking at first, Mr. McPherson, then we'll try to identify them.

The Court: Just a minute, Mrs. Barnes. You questioned the witness concerning a letter, I have forgotten the date of it.

Miss Barnes: April 29th.

The Court: Dated April 29th.

Miss Barnes: Signed by Mr. Huggins.

The Court: 1952.

Miss Barnes: Signed by Mr. Huggins.

The Court: All right. Now, have you a certified photostatic copy, Mr. Curran, of the original letter?

The Witness: I have.

The Court: All right.

Miss Barnes: These are just for free?

Mr. McPherson: Unless you say what "this" is——

Miss Barnes: I know.

Mr. McPherson: ——your answer isn't going to be intelligible. [77]

Miss Barnes: I am going to have to find out

(Testimony of William M. Curran, Jr.)

myself what I am looking at before I can certainly get——

The Court: Well, the witness testified that he has with him a photostatic certified copy of the original letter dated April 29, 1952, signed by E. V. Huggins. Now, is that the document you are talking about?

Miss Barnes: Yes, that is one of them.

The Court: All right. Let's get one at a time.

Miss Barnes: Now, you are going to see all these, your Honor, and if they are going to go into evidence I don't think it is necessary if they are in evidence that he read them into evidence, do you?

The Court: No, but let's get them marked.

Miss Barnes: Yes.

The Court: Get that letter marked as an exhibit.

Will you give it to the clerk and have it marked?

That one will be received in evidence, so if you will please hand it to the clerk, so we can get it marked and then you can examine the witness on it.

Miss Barnes: Can we use this one, it is the prettiest?

Mr. McPherson: I have no objection to the receipt of the photostat of the original letter of Mr. Huggins, dated April 29, 1952, with the attachments therein referred to, as certified on this document. [78] The Mr. Huggins who signed that letter is the same Mr. Huggins who signed the declaration of taking in this case, your Honor.

The Court: All right. Then that document with

(Testimony of William M. Curran, Jr.)

attachments will be received and marked Defendants' Exhibit B. So if you will mark it, Mr. Clerk.

(The document referred to was marked as Defendants' Exhibit B, and was received in evidence.)

Miss Barnes: Now, Mr. Curran——

The Court: Will you delay any question until we have it marked?

Do you wish to question the witness further concerning Defendants' Exhibit B?

Miss Barnes: Yes, we have got another one. We might as well get them in right now.

The Court: Do you have an extra copy of it, Mrs. Barnes?

The Witness: I do, yes, sir.

Miss Barnes: There is another exhibit on which I would like to question the witness.

The Court: Well, let's find out what document he has concerning which you wish to question him, and maybe we can get a photostatic copy of it for the record.

Miss Barnes: Yes. It is the letter of December 27, 1950, memorandum to the Assistant Secretary of the Air Force, signed by and from General Colby M. Myers.

The Court: Do you have in your possession a [79] copy of the document referred to by the witness?

The Witness: Yes, I do, your Honor.

The Court: Have you with you today a photostat certified copy?

(Testimony of William M. Curran, Jr.)

The Witness: I also have that.

The Court: Have you seen that, Mr. McPherson?

Mr. McPherson: Yes.

The Court: Do you want to offer that document in evidence, Mrs. Barnes?

Miss Barnes: Yes, with its appendages. Besides that letter there is another short letter dated January 10, 1951.

The Court: Is that an attachment to the other?

Miss Barnes: They have made it an attachment, and I imagine it goes together.

The Court: All right. Do you have any——

Miss Barnes: There is also a map here.

The Court: Well, that is attached to it, is it not?

Miss Barnes: Yes.

The Court: Do you have any objection?

Mr. McPherson: No objection.

The Court: All right. The certified photostatic copy of letter dated December 27, 1950, signed by General Myers, is it?

Miss Barnes: General Colby M. Myers.

The Court: Together with the attachments, maps [80] and other letters attached, are received in evidence and marked Exhibit No. C, Defendants' Exhibit C. You have a copy for Mr. McPherson and Mrs. Barnes.

(The documents referred to were marked as Defendants' Exhibit C, and were received in evidence.)

Mr. McPherson: I have a copy.

The Court: You have a copy?

(Testimony of William M. Curran, Jr.)

Mr. McKendry: Yes, your Honor.

The Court: Very well.

Miss Barnes: Have you seen the copy yet, your Honor?

The Court: I have seen B, and we are waiting for C.

Miss Barnes: You didn't bring a photostat for the Court of the one from Seybold?

The Witness: No, I did not. I have a copy.

Miss Barnes: May I see that a moment again?

I would like in the event that there is not a photostat here for the Court, that this particular letter be read into the record, and I think it should also be made an exhibit under the same conditions as the original directive was, the wire.

The Court: Have you seen the letter, Mr. McPherson?

Mr. McPherson: No, I have not.

The Court: Would you show the letter to Mr. McPherson?

Mr. McPherson: No objection to the letter of January 9, 1951, which has just been shown to me.

The Court: The letter is dated what, December?

Mr. McPherson: January 9, 1951.

Miss Barnes: January 19th.

The Court: And from whom is it?

Miss Barnes: The letter is from J. S. Seybold, Colonel, CE, Division Engineer. It is to the Engineers at San Francisco, I believe.

The Court: Well, now, Mr. Curran, could that

(Testimony of William M. Curran, Jr.)

letter be received in evidence, and be withdrawn upon the substitution of a true copy?

The Witness: Yes, your Honor. In fact, I don't know that it need be withdrawn. It is a typed copy.

The Court: Then that letter is received in evidence, dated January 19, 1951, from J. S. Seybold, marked Defendants' Exhibit D.

(The letter referred to was marked as Defendants' Exhibit D, and was received in evidence.)

Mr. McPherson: Actually I see no materiality to the letter. We do not object to it.

The Court: Yes. I haven't seen the letter, but will you have the clerk mark it.

Q. (By Miss Barnes): Mr. Curran, these are all official letters from the files of the District Corps of Engineers in Los Angeles?

A. That is correct. [82]

Mr. McPherson: You had two more subpoenaed?

Miss Barnes: I had?

Mr. McPherson: Yes.

Miss Barnes: Thank you very much, Mr. McPherson. Touche. Well, I thought they were incorporated mostly in those.

The Witness: I believe they are all in.

Miss Barnes: I believe, Mr. McPherson we have them; you see, they were combined in these exhibits.

The Court: In other words, the other documents that the witness has are attached as attachments to the exhibits which are in evidence?

The Witness: That is correct.

(Testimony of William M. Curran, Jr.)

The Court: Are you satisfied with that, Mrs. Barnes?

Miss Barnes: Yes, your Honor. I thought Joe was discovering something else for me. Made me real happy for a moment.

Your witness, Mr. McPherson.

Cross Examination

Q. (By Mr. McPherson): Mr. Curran, you do not mean by your testimony to cast the inference that you or anyone in the office of the District Engineers in Los Angeles has any voice in or determination as to which property, if any, will be condemned for military use as United States bases?

A. No, in—— [83]

Q. Did you perform any function——

The Court: I think the witness wishes to supplement his answer.

Mr. McPherson: Oh, I beg your pardon.

A. No, in the office of the District Engineer in Los Angeles upon direction we prepare declarations of taking in blank and submit them for recommendation through the South Pacific Division Engineer's office to the office of Chief of Engineers, where they may be changed, may be declined, or may go on up to the Secretary of the appropriate department for signature.

Q. (By Mr. McPherson): And the Secretary may or may not have them signed?

A. That is correct.

Q. You were asked whether there was any other

(Testimony of William M. Curran, Jr.)

identification of the property as being that of the Barnes McKendry land in the declaration of taking assembly which you prepared. Examine your file, sir, and see if you have a transmittal memorandum dated December 4, 1952, from your local office to the Division Engineer at San Francisco transmitting the assembly covering Tracts L-2040, 2043, 2071 and 2072.

A. That is the open file on the counsel table. I believe it is turned to that letter. [84]

Mr. McPherson: I should like to have marked for identification, or will offer directly in evidence the copy of the letter which I have just described, which transmits the declaration of taking assembly, identifies the property as that of Mrs. Barnes and McKendry interest, indicates the appraisal information which the government then had, indicates the failure to secure the option, the breakdown of the negotiations, and recommends the condemnation of the property.

The Court: Have you seen the letter, Mrs. Barnes?

Miss Barnes: No.

The Court: Will you examine it?

Miss Barnes: Mr. McKendry, would you like to examine it?

Mr. McPherson: It is one of the exhibits attached to Mr. Lavine's affidavit.

Miss Barnes: Do we have a copy of that?

Mr. McPherson: Yes, you do have.

Miss Barnes: I don't believe it is a legible copy.

(Testimony of William M. Curran, Jr.)

Mr. McPherson: That is the one I agreed to give them a copy, because it didn't reproduce. In our file that is all I have, is a photostat.

The Court: Would you identify the letter, Mr. Witness, as to date, and the signature?

The Witness: This is a letter 4 December 1952 to the Division Engineer, South Pacific Division, Corps of Engineers, U. S. Army, P. O. Box 3339, Rincon Annex, San Francisco 19, California, [85] the subject of which is Declaration of Taking No. 2 covering Tracts L-2040, L-2043, L-2071 and L-2072, Edwards Air Force Base, California.

The Court: Well, this letter then is received in evidence. Do you have any objection to the receipt of the letter in evidence?

Miss Barnes: No, your Honor.

The Court: All right, it is received as Government's Exhibit No. 1. And if you care to substitute a true copy your file copy may be withdrawn. Government's Exhibit No. 1.

(The document referred to was marked as Government's Exhibit No. 1, and was received in evidence.)

The Witness: For further identification, it is the letter of W. R. Shuler, Corps of Engineers.

The Court: There is also a copy, a photostatic copy of Government's Exhibit No. 1 attached to the affidavit of Mr. Lavine.

Mr. McPherson: Yes, but it is not a very legible copy.

Q. Now, Mr. Witness, I show you the Defend-

(Testimony of William M. Curran, Jr.)

ant's Exhibit D, and direct your attention to the language in the first paragraph thereof, relating to the directive, and the sentence reading, "The land acquired under this directive should be purchased strictly in accordance with the priority indicated therein." Does that have anything to do with the order in which land should be condemned instead of purchased? [86]

A. No, sir.

Miss Barnes: I object to that. You have just asked him and he has testified he had nothing to do with this, he just takes orders.

The Court: I think the objection should be overruled. It is a question of the priority of purchase or priority in condemnation, isn't it, Mr. McPherson?

Mr. McPherson: Yes, your Honor.

The Court: I think the objection should be overruled. Did the witness answer the question?

The Reporter: Yes, I have answer "no, sir."

Q. (By Mr. McPherson): You were asked this morning if you could recall any cases in which numbered declarations of taking other than No. 1 have been filed.

Miss Barnes: Muroc only.

Q. (By Mr. McPherson): How about other cases, other property?

A. Yes, in numerous projects I have prepared declarations with recommendations that same be accepted by the Secretary, as many as 50 in one

(Testimony of William M. Curran, Jr.)

case in the Southern District of California, Civil No. 9103.

Mr. McPherson: That is all.

The Court: I don't think the witness finished the answer. [87]

The Witness: That was in Lytle Creek and Home project, also in the Southern District, any number of declarations from 25 to 30 were prepared and filed in the same case.

The Court: That is all apparently, Mr. Curran.

Mr. McPherson: That is all, your Honor.

(Witness excused.) [88]

* * * * *

DEMBA M. GREENE

having been called as a witness in behalf of the defendants, and being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Demba M. Greene, G-r-e-e-n-e.

* * * * *

Direct Examination

Q. (By Miss Barnes): Mrs. Greene, when did you first go in business at Muroc?

A. I think it was in March of nineteen—well, I can't recall the year exactly, but was immediately after the 7th of December, when they made the attack on the Islands.

Q. In other words, you were already located in that country, is that correct? A. Yes.

The Court: You are talking about 1941, 1942, is that right?

(Testimony of Vemba M. Greene.)

Miss Barnes: 1941.

The Court: Pearl Harbor was December 7, 1941, and it was shortly after that that you went into business?

The Witness: We moved out there in January of 1942 then, and we opened up for business in the first part of March.

The Court: Of '42?

The Witness: Yes, sir.

The Court: All right.

Q. (By Miss Barnes): What business were you in there, Mrs. Greene? A. To begin with?

Q. Well, just state—what I am interested in also is what business you had, for instance, say in [93] 1949.

A. Well, when we first started out we had a small restaurant, that seated twelve people, we served sandwiches and coffee and soft drinks. And then as time went on we added to that and when the demands of the personnel at the Base demanded we served more food we did, and as time went on we added a trailer court and we added a service station and we added a package liquor store with the consent of the Base.

Q. When you say the consent of the Base, what did the Base have to do with whether you should or not have a package liquor store?

A. It was told to us the fact we were within 660 feet of the boundaries of the, at that time it was known as the Edwards Muroc Base, that it would be necessary for my husband myself to have

(Testimony of Vemba M. Greene.)

a letter signed by the Commanding Officer of the Base, requesting that the State of California grant us a license. We petitioned the Commanding Officer, and he furnished us the letter, and it is on file at Sacramento in the State Board of Equalization.

Q. You were thereupon granted a license, is that correct? A. That is right. [94]

* * * * *

Q. Can you remember, Mrs. Greene, what did the town of Muroc consist of in the years 1949 to '50?

Mr. McPherson: Objected to as irrevelant, incompetent and immaterial, not probative of any issue in this case. [101]

Miss Barnes: Well, we have papers, Mr. McPherson, that are filed before the Court. This witness is out of order but we do have papers that have a list of all that stuff and I want it from her, not from the government.

The Court: Well, I will overrule the objection. Do you understand the question, Mrs. Greene?

The Witness: Well, I think I do, but maybe it had better be repeated.

The Court: She wants to know what the town of Muroc consisted of, I think, in 1949 and '50, so would you state that?

A. Well, Mr. Anderson had a store at the original location, what they call the townsite of Muroc, and across the street from him was the depot, and he had a service station there, and he had several

(Testimony of Vemba M. Greene.)

units that he rented. '49, '50, and the County of Kern had leased the ground facing on the highway, of the Muroc highway that came off 466 into the base, and they had built a sufficient number of units to house about 750 people; there was a school house there across the street from that. Now, right at the corner of the road, at the school house, we were north, going back toward the highway, and we had 73 acres in that piece and we had a 30-unit trailer court, and we had five or six rentals, we had a restaurant, we had a super service station, and we had a liquor store. And up the road [102] further, across the track, going towards the base, a man by the name of Mr. Fitts had four apartments which he had constructed in there for rental, and I don't know the name of the gentleman in front of him but he had four apartments, and coming south just a little ways was a two-story house been there about 30 or 40 years, but in excellent condition, and they had about six or eight rentals in that, and one of the old time inhabitants there, who had been there for around 35 or 40 years by the name of Mertz, they had several rentals. In fact, there was 15 or 20 families that had bought property between the road that went to the base, at that time it would be the north gate, and across the railroad track before it was moved to where it is now, and I would say there was in the neighborhood of 55 or 60 families living in that area. I could go into more detail if you would like.

(Testimony of Vemba M. Greene.)

The Court: I think generally that gives the Court an idea of what the town consisted of.

Q. (By Miss Barnes): Did you mention the B. F. W. Club?

A. Yes. Well, no, I didn't mention it, but the B. F. W. clubhouse constructed on the edge of the lake, and then there was Mr. Pauley, he had rentals in there, and there were several more that had rentals. We all got our mail at the post office. [103]

Mr. McPherson: I move to strike the testimony of the witness concerning the structures and trailers in the old townsite of Muroc on the same grounds that were assigned in support of the objection to the question.

The Court: I will deny the motion.

Q. (By Miss Barnes): Now, Mrs. Greene, I would like to show you——

A. We had rentals but they were not right there.

Q. ——some newspaper advertisements.

The Court: What date is that issue?

Miss Barnes: What date?

The Court: Yes, approximately, '55, '54.

Miss Barnes: May 1955.

Q. Does that page relate to any spot you know?

Mr. McPherson: Object, if your Honor please, obviously public newspaper advertising in 1955 could not have anything to do with the legal right to condemn the defendants' property in 1953.

Miss Barnes: Discrimination. [104]

* * * * *

(Testimony of Vemba M. Greene.)

The Court: In other words, you want to prove by this witness——

Miss Barnes: Two things. We are not only now proving discrimination. The first proof was what was Muroc when they said there was nothing there. The second point is that she was displaced, discriminated against, not allowed to go in business, her land was taken from her. She was pushed out eight miles; when she begged them to have a liquor store in they wouldn't let her down it, oh, no, couldn't have a liquor store on the government property, but these advertisements show they advertise a liquor store. She can testify there is one; I can take the stand and testify there is one, so can Miss Martin. She and I were in one last Sunday together, which was open on Sunday incidentally, which was all right with me. But what we are trying to prove here is that they scream security and [107] then they are advertising. My husband wants me to read this. There is, of course, a further reason.

The Court: You are reading from the transcript?

Miss Barnes: Transcript in this same case, September 9, 1953, page 24, line 8, Mr. Weymann:

“There is, of course, the further reason and that is for reasons of security. These are classified operations that are carried on in there and in order to protect the security of those operations the government should have possession of the property as soon as reasonably possible in order to prevent any leakage from these premises. There is here a motel,

(Testimony of Vemba M. Greene.)

for example, on these premises and people come in and go out there, and that is the thing we seek to put an end to.

“The Court: Well, has that condition existed all the time?

“Mr. Weymann: That is correct, but there is no reason why it should continue any longer than is necessary.”

There is more of this later in the transcript.

I would like these in the record, your Honor. I will ask they be marked for identification otherwise, but I think this covers a very definite point in the case. They are screaming security, and yet they run these advertisements, and [108] this is run in all the papers.

The Court: Well, those newspapers may be marked for identification as Defendants' Exhibit E.

Miss Barnes: Your Honor, I could have brought in hundreds of them.

The Court: Will you have the clerk mark your document for identification?

(The newspapers referred to were marked as Defendants' Exhibit E for identification.)

* * * * *

Miss Barnes: I won't push you too far, your Honor; you have been very nice.

Q. I believe, Mrs. Greene, that you left out the clothing store and a couple of other gas stations.

A. I am sorry, I did.

The Court: They were there in 1949 and '50?

(Testimony of Vemba M. Greene.)

The Witness: Well, the clothing store was in a building rented by us.

Q. (By Miss Barnes): And I believe Mr. Levine's restaurant was there in 1949?

A. Well, that is true, but I included that in that housing, and the welfare club, and there was a service station down the street.

Q. And there was also a snack bar?

A. Yes. There were three restaurants operating there at one time, outside the base.

Miss Barnes: I can't remember whether we got in evidence, or whether there was an objection, as to what the town of Edwards now consists of.

Mr. McPherson: We object——

Miss Barnes: They object, and was it sustained?

The Court: Yes, that was sustained.

Q. (By Miss Barnes): Do you know of any of the old timers that had like [110] businesses that now exist in the town of Edwards, that have operations in Edwards?

Mr. McPherson: That is incompetent, immaterial and irrelevant.

The Court: I will overrule the objection. Are any of the old timers who did business in Muroc who are now doing business at Edwards?

The Witness: We were promised the opportunity.

Mr. McPherson: I move to strike that answer as not responsive. You can answer yes or no.

The Witness: There is not.

(Testimony of Vemba M. Greene.)

Q. (By Miss Barnes): Were you ever promised you could operate there?

Mr. McPherson: We object, your Honor.

The Court: I think the objection is sustained. The fact is the witness testified that none of the old timers are engaging in business in Edwards.

Miss Barnes: That means, of course, the old timers whose land were taken in one form or another by the government.

The Witness: I understand.

Miss Barnes: Your witness. [111]

* * * * *

PANCHO BARNES

a witness in her own behalf, having been first duly sworn, testified as follows:

The Witness: In the first place, I would like his Honor to take an overall view of the territory.

The Court: That map has been introduced in evidence?

Miss Barnes: It is already in before, in the motion, as Exhibit 7.

The Court: As Exhibit 7?

Miss Barnes: As Exhibit 7.

The Court: Is that the government's or plaintiffs' exhibit?

Miss Barnes: That is the defendants' Exhibit 7.

The Court: Does the Clerk have it marked?

The Clerk: Yes, it is marked on the corner. Yes, that is Defendants' Exhibit 7, introduced at the hearing in February 1954.

(Testimony of Pancho Barnes.)

The Court: Do you have a pointer there the witness might use?

Miss Barnes: Mr. Curran, could I ask you to please come hold this side for me?

Your Honor, I don't know how well you can see this. [120]

Direct Examination

The Court: I was just wondering, Mr. McKendry and Mr. Curran, if you will hold the map over here. Mr. McPherson, you gentlemen may place yourselves so you can see the map too.

Mr. McPherson: Very good, sir.

The Court: Mrs. Barnes, you have been sworn, have you?

Miss Barnes: Yes, your Honor, and I am testifying now.

The Court: All right.

Miss Barnes: This map——

Mr. McPherson: That was 7 in the previous hearing. What is it in this case?

The Court: Well, do you want to re-introduce it as an exhibit in this hearing?

Miss Barnes: Is that proper?

The Court: I think so.

Mr. McPherson: It will be Defendants' F.

The Court: F is the next number in this hearing, and so please refer to it as Defendants' Exhibit F in this hearing.

(The map referred to was marked as Defendants' Exhibit F, and was received in evidence.)

(Testimony of Pancho Barnes.)

The Witness: This is a scale map, your Honor. Now the government in the first hearing of September 9, 1953, came into court with a map which showed the east line of the base here, the line here, the east line of the dry lake, and showed the west line of the base over here, approximately [121] here (indicating).

The Court: "Over here" would mean nothing in the record.

The Witness: Well, we will say over close to the west line of the Rosamond Dry Lake, and the transcript will show that Mr. Weymann, the attorney for the government, did say to the court that the defendants' property was in the very center of the Edwards Air Force Base.

The Court: Now, that is rectangular, almost?

The Witness: 360 acres.

The Court: 360 acres, that is outlined in blue.

The Witness: Yes, the runways of the air base are outlined in green.

The Court: Oh, yes, I see.

The Witness: This is the airport proper here, actually it ran down into the edge of the property, the east 80 of the property was where the concentration of most of the buildings were, and alfalfa, 180 acres of alfalfa in this area (indicating), and the rest was either airport or desert grazing land. In other words, it was fenced and had considerable crops from time to time throughout the various years. This at the time we were in court was the proposed new runway.

(Testimony of Pancho Barnes.)

The Court: That's the green coming off of the Muroc Lake?

The Witness: Yes, over the old base, the old air base which is shown in detail on these maps, which is a United [122] States government map. Now, that was at that time under construction, and has since, I believe, been completed. Am I right, Colonel Akers, is that runway completed?

Colonel Akers: Yes.

The Witness: Now, the air base consisted before mostly of this land project, this later taking; in other words, that we are in. The air base edge ran, I believe this line, Mr. McKendry, can you see? This is the west line of the base.

The Court: Can you designate that line some way for the record?

The Witness: Well, it would be approximately two miles. You see, these squares are each a section, and a section is approximately a mile. Two miles east of the subject property, there is a road, and to the east of that road, county road, there is the air base fence, and that fence is still the same.

The air base itself has the same west boundary to all intents and purposes. This land is open to the public still, as far as going on it is concerned. Now, up in here, in these sections——

The Court: Well, that would be kind of north-easterly?

The Witness: We will say it is some mile or so in a northwesterly direction from the present newly completed runway, is the Wherry Housing. That

(Testimony of Pancho Barnes.)

has grown considerably. It is extending all about here. (Indicating.) [123]

Now, this is a sort of a topograph map I am showing you of the base, and I am going to get to more detail on the Wherry Housing and the shopping area.

Now, this would be the west line of the base as it was before the property was taken by the government, and the east line of the base extended to here, approximately.

The Court: Clear over to the east end of the map?

The Witness: Clear over to the east end of the map. I believe Highway 395 is the boundary there, is that correct?

Mr. McKendry: In part.

The Witness: Well, it extends almost, or in part to Highway 395, which is the main highway which runs down from Bishop, which runs through back roads to Escondido. Of course, these marks, so your Honor will know what they are, they contended this was the very center of the air base.

The Court: They contended the subject property was?

The Witness: Yes, and these marks were showing what the center was of the air base, when they were contending that this was the very center.

The Court: Well, that is a cross in green, is it?

The Witness: Yes.

The Court: Above which is marked "Center of Proposed A F B property"?

(Testimony of Pancho Barnes.)

The Witness: Yes. And also that was testified to by [124] Colonel Miller of A.D.C. So the center of the proposed Air Force property would be about the center.

The Court: That is the expansion?

The Witness: Yes.

The Court: Would be about that cross in the approximate center of Muroc Lake?

The Witness: Yes. Now, your Honor, they went to a great deal—that is, the government went to a great deal of trouble to show the subject property was being flown over, and why they would need the subject property on account of the flight of the airplanes, and their map of the area showed a great many of these patterns. I took one of the runways from their map, that is, taken from the Air Force map that they put in evidence.

The Court: That is the runway at the north-westerly part of Muroc Lake?

The Witness: Yes, extending it showed they were flying with those paddles directly over the Wherry Housing. At the time Colonel Akers made a statement that they were ground runs, they couldn't fly in this direction. That will be found in Judge Beaumont's decision, they couldn't fly on the southwesterly side.

In checking that, I did this from the maps, I found they were centered more over the housing. Of course, it has been explained since this was made. [125]

We had a railroad across the base, which you

(Testimony of Pancho Barnes.)

have heard a great deal about. This is the line then on the map, extending across the lake in a north-easterly direction. The railroad has since been relocated to where it extends towards the top of the map, or even off the map. I think the railroad line is continued from here. This was in Public Law 564, Congress recognized the necessity for the use of this particular lake, and the recommendation was that the railroad should be moved, and that land should be acquired to relocate it and the relocation of it should be paid for.

The Congressional Record of the hearing we referred to that brought on the law, Public Law 564, under which the property was condemned, had to do entirely with this area.

The Court: The Muroc Lake area.

The Witness: Not only the Muroc Lake area but the town of Muroc itself, which was right in here. They wanted that, and the reason that they said they wanted it—it is in the Congressional Record—was to keep encroachment from coming in on the base itself. Now, that was all that Public Law 564 had.

In Public Law 155, of the 82nd Congress, I haven't studied that law, your Honor, but we do have a copy which is in the documents you received today, which said these mud mines, which were located up here on this lake, will [126] be moved over to the Buckhorn Lake area, which is in here. The property that Miss Martin was talking about was, I believe, right next to this property.

(Testimony of Pancho Barnes.)

The Court: Well, that Buckhorn area as you describe it is the brown portion east of Rosamond?

The Witness: Well, mostly the brown portion, but the area between the two dry lakes.

The Court: All right.

The Witness: This is Buckhorn Lake area. In fact, Buckhorn itself is right up in here, the Buckhorn Springs, and they refer to this Buckhorn Lake. The subject property is actually close to the Buckhorn Springs, but they are named from Buckhorn Lake.

This would be the Muroc township area up in here.

Now, even as late as the 82nd Congress, it is proposed to move the mud mines from the lake here to the Buckhorn Lake area, meaning in this area here. That is what it says in the bill. This, of course, was never done.

That is one question I wanted to ask Miss Martin, but she is not here, but there has been no mud mine moved, and yet it was very specifically the one thing that the Congress were very anxious about. They said was there anything in the proposal that would mean cessation of the mud mines, and General Myers stated they would move the operation to the lake to the southwest. The only lake to the southwest [127] is the Buckhorn Lake area, and incidentally the mud here is good mud. The Rosamond Lake, I don't believe, is suitable for rotary mud. It contains very much more salt on this lake.

(Testimony of Pancho Barnes.)

I have driven across here, I delivered milk to the Air Force base for 12 years and the old camp used to be situated over in this area.

The Court: You are talking about Muroc Lake now?

The Witness: Yes.

The Court: That would be east of the lake?

The Witness: On the east side of the lake, and when I delivered milk to them, even though there were a foot of water on the lake—we used to have wet years—I have seen this lake many times completely inundated. However, we used to be able to drive our truck across the lake even though it was full of water if we kept on the route. If there was so much as the space of a line off you are stuck immediately.

The Court: You were talking about Rosamond?

The Witness: Yes. Some of this is quite good land to land on. I have landed there many times. I have landed on these little lakes, but this lake wouldn't be fit for test aircraft to land.

The Court: Well, you are again talking about Rosamond Lake? [128]

The Witness: Rosamond Lake. Now, Muroc Lake itself, which is the technical name, it is known as Rogers Dry Lake, that lake is always pretty good, and it has an entirely different substance of clay. I can tell you why, but I don't think it is necessary. But this lake is a very fine safety factor for test aircraft. They can come in from any direction, any way, if they are in trouble. I

(Testimony of Pancho Barnes.)

have known pilots with trouble testing airplanes far west of the town of Lancaster to come back there in two minutes. In fact, George Welch, who was killed very recently was very close to the town of Lancaster. They don't seem to be able to test over the Air Base. He bailed out, unfortunately unsuccessfully, his engine fell out on Lake Hughes, which is way off the map. In other words, it is important and I would be the first to say that lake is important to the testing of aircraft, and it should be added, and the moving of the railroad is an additional safety factor, because a lot of tracks, or the mud mine pits would be a hazard.

And everything I know about Public Law 564 as explained to Congress was quite right and quite in keeping with proper and working plans for testing of airplanes at Muroc, even getting the town of Muroc itself and moving the people out, because it would have been pretty close. They have moved a lot of the old places, and rebuilt over [129] into this town.

Now, their boundary now, I think the road has been moved, there has been this road around the lake, and the new road comes over here.

The Court: Well, the new road is slightly west of the old road.

The Witness: Yes, slightly west, and opens onto Highway 466.

The Court: Mrs. Barnes, where is Edwards?

The Witness: The town of Edwards?

The Court: Yes.

(Testimony of Pancho Barnes.)

Mr. McPherson: Do you mean, Judge, the railway station or the shopping center?

The Court: I mean the shopping center?

The Witness: The shopping center is in this general location, and is about—you see these squares are a mile, these are sections. It's a mile or two miles, as the crow flies, from the new runway.

Mr. McPherson: How far is it from the railroad station?

The Court: I would like to know.

The Witness: Well, the railroad station doesn't mean anything. The railroad station would be up—instead of placing the railroad across, it has been rebuilt and it crosses across the top of the map here somewhere.

The Court: So the railroad station would be near the top of the map, and approximately directly north of what you call the Wherry Housing?

Mr. McPherson: About eight miles, I think.

The Witness: Well, it is very close to this road just east of the old road. I think the old road goes right by the station.

Mr. McKendry: Your Honor,—

The Court: Well, now, I think we can't have two witnesses, one sworn and one unsworn.

The Witness: My husband drives that every day, and he says the station is on the old road, that came back into the old road, and the underpass there at the station would be at the top, at the north.

(Testimony of Pancho Barnes.)

The Court: It is kind of north and east of the Wherry Housing.

The Witness: Well, it would be six or eight miles.

The Court: Yes.

The Witness: Depending. It is a little more than six miles, because we are running opposite, diagonally. It is a little over, your Honor, probably eight miles by road.

The subject property,—and this is taken from the Air Force map, we did this from their own maps, the Air Force property is approximately two miles, just the other side of the road, which is just two miles east of the subject property. The runway, as you see here, your Honor, is more [131] than three miles. We are again cutting diagonally, I think it is about three, I know it is quite a little over a mile, your Honor. And consequently we are well over three miles, that is the edge of the subject property to the edge of the new runway.

Now, there have been a lot of statistics, your Honor, about the distances from runways, and there are a great many runways operating in the country, and they are using the dry lake over the public road here, we have the Mojave Air Base is flying, the edge of their runway is within a question of feet of Highway 46, which is now four lane—it is getting to be all four lane. And there is no military reason why, no matter how many paddles they may draw, which they will show you on their maps, which is merely confusing for just because they put a paddle doesn't mean it is used by the aircraft.

(Testimony of Pancho Barnes.)

I went to the Wherry Housing, to the beauty shop, to get my hair fixed over there, and when I was driving down the road—and incidentally these are all county roads, this road is a county road, maintained by the county, and the various roads that the government has built in, I don't know whether they have all been deeded to the county yet, but I believe it was the plan to deed them. This road has always been a county road and is still maintained by the county, and is a heavily traveled road, because a [132] great many of the people that work in that area travel this road, to come to their own homes, ranches, in Lancaster, and there was another road cut in here. The old road that the property was on, the paved road to Rosamond, which was our road, which was the main county road, continued down here and joins up here for a mile and then two miles more to the road. The government has brought a more direct road from the Wherry Housing down, which has cut off this road to the subject property. This road and this road here are both owned and maintained by the county, and paid for by the county, that is, the maintenance by the county taxpayers of Kern County, of which I am one.

The Wherry Housing has a peculiar setup whereby the people that own the Wherry Housing do not pay the county taxes, but the renters of the houses do have the taxes of those houses, personal property taxes on the houses, or whatever they call it, attached along with the rent and they are paying Kern County taxes.

(Testimony of Pancho Barnes.)

We have a school there, in fact, I think there are two schools, an elementary school and a high school, and those are maintained by the county, paid for by the county, by Kern County taxpayers. The public library, which is growing very fast, and is maintained by Kern County taxpayers.

Now, on this same map we have a center, a shopping center which is highly publicized, and is open to the public [133] and it consists of everything that was in the small town of Muroc before and possibly some things have been added. When I say that, they have a large market, I mean a pretty nice looking sort of super-market type of thing, and they have a beauty shop, barber shop, lunch room and they have a liquor store, and there are projected plans—this is hearsay, I am not sure about it—

Mr. McPherson: Then I suggest you not say it, if it is hearsay.

The Witness: —there will be a cocktail bar and lounge.

Anyway the town has been moved here, and the public is invited to come in here from all around, and this base is all open. It isn't as if it were closed off or fenced off. It is not. [134]

* * * * *

The Witness: In other words, this is the important lake, I can tell you that, I have been there a great many years, I flew over it myself. I tested aircraft over there in 1948. It is perfect, and they

(Testimony of Pancho Barnes.)

needed it, and they needed to move the railroad, and they very likely needed this land in here.

You can see relatively over the period of the distances how far the subject property is and is outside the fence.

Now, there is another thing, I would like to overlay on this map a very tiny map to show the Judge what I mean also in regard to the rest of the property before we argue about the Congressional record; also that the Wherry Housing is not only a housing—now, one thing I don't know, your Honor, whether the housing, and I did read all the Congressional records on it, but I found nothing in the housing which went into super-markets, barber shops, baby stores, and various types of stores. I found nothing that gave to the Wherry Housing any right to put in a town community, it had nothing except housing, and that is why I don't know, your Honor, oftentimes there are facilities needed such as [138] commissary, but there are other places available, such as Mrs. Greene's place up the highway here where groceries and stuff are obtainable, and liquor store and where stores should be, but they have brought them into the air base area.

Now, if you visualize this—they will show you their map, your Honor, which is prettier than mine, though mine is bigger—the edge of the proposed air base which they claim now to own, I think comes about to this line, isn't it, Mac? Wait a minute, right in this area.

The Court: Well, it is west.

(Testimony of Pancho Barnes.)

The Witness: West of——

The Court: Rosamond Lake?

The Witness: West of Rosamond Lake. It is approximately two miles east of the Highway at Rosamond, I guess, the town of Rosamond.

Well, I believe maybe we had better read that while the map is open, so his Honor can see it better. Do you want to get that?

The Court: You may want to put that map down and rest a little bit.

The Witness: I am reading from the second session of the 81st Congress, regarding the acquisition of land at Muroc Air Force Base, California.

“Mr. Sheppard: We will take up the next item, the ‘Muroc Air Force Base, Calif.’ where I see [139] that you are making a request for \$3,800,000.

“General Myers: Muroc is, of course, the large base for our experimental aircraft, developmental aircraft. You all know that we have a large lake there, a dry lake, that lends itself to this type of work so that these airplanes can land on it. It is 15 miles long and some 6 miles wide. We need a lot of land there, and that is one item we have in here for the base expansion.”

Should I read it all, your Honor?

The Court: Well, you read such portions as you feel are material.

The Witness: Well, they are simply discussing the price of land, at \$34 an acre.

The Court: You want to omit that?

(Testimony of Pancho Barnes.)

The Witness: Well, it is a little bit, I should have just read that. It says:

“Mr. Sheppard: Does the \$34 per acre include some of the mining locations that you are going to have to take over?

“General Myers: It includes those mud-mining operations, and we have worked out an arrangement with them whereby we can acquire their properties and they can move over to a new location. [140]

“Mr. Sheppard: In other words, there is nothing in this proposal directly or indirectly that is going to cause the cessation of that operation?

“General Myers: It will cause the stopping of the operation on the lake itself, but they will move over to another lake to the southwest.

“Mr. Sheppard: But they will have available the material necessary for the economy of the oil operation. They are presently supplying that material.

“General Myers: That is right.

“Mr. Sheppard: You are not cutting that off?

“General Myers: No, sir.

“Mr. Sheppard: And it will not impair the operations of the oil industry?

“General Myers: That is right. I have the papers here with me.

“Mr. Sheppard: If you say it is so, you do not need to bring out the papers.”

Then he goes on to say it has been a disturbing situation.

Now, I think we will skip that as not being any-

(Testimony of Pancho Barnes.)

thing that I am particularly interested in pertaining to the case. Getting down to the question of the cost of the land: [141]

“Mr. Wigglesworth: How much land do you propose to buy?

“General Myers: 80,500 acres at about \$32.40 per acre, based on the over-all appraisals the engineers have made in the area.

“Mr. Sheppard: Regarding the cost of the acreage, does that figure cover the across-the-board percentage? You recognize the fact that there will be high and low spots?

“General Myers: That is right. The mud mining operations will be more expensive.

“Mr. Sheppard: That is what is shoving up the price on the average. The land itself is very definitely desert. I would say that the cost of the land is that high because of the mud mining operation.

“General Myers: That is right.

“Mr. Sikes: For what purpose do you propose to buy the 80,500 acres?

“General Myers: We have to acquire the land on this lake, or part of the land on the lake. We have to put a runway in there eventually, and we have to relocate the railroad that runs right across the lake. We have to acquire the land for that, and then we are acquiring the land in the vicinity [142] to prevent encroachment on the base area.

“Mr. Wigglesworth: What will the total acreage be?

(Testimony of Pancho Barnes.)

“General Myers: 139,000 acres, plus the acres we have now.”

Then they talk about how many acres they have now and the two generals don't agree on just how many acres they have now.

The Court: Well, your point is that the subject property is not within the vicinity?

Miss Barnes: The subject property is not described in any way.

The Court: No, your point is it is not within the vicinity?

Miss Barnes: Oh, definitely, your Honor.

Well, there is a little more he thinks I should read.

“Mr. Wigglesworth: You are going to increase it by 50 per cent?

“General Myers: I have a map here that shows”—now this is the map, I think that Mr. McPherson was referring to, not the one he thought they might have showed him, but I don't think they even saw it, Mr. McPherson. It doesn't sound as if they looked at it from the testimony. He simply said he had it.

“I have a map here that shows the existing [143] reservation, 156,560 acres. Proposed acquisition 139,000 acres.

“Mr. Wigglesworth: I thought you said 85,000 acres.

“General Myers: The total additional land we require is 139,000 acres. In this estimate we are able to procure 80,000 of that.

“General Spivey: This is just a portion of that.

(Testimony of Pancho Barnes.)

“Mr. Sheppard: Some of this acreage in there is already government property, and there will be a transfer from one department to another.”

I think that is all that pertains to the case. There is very little more. [144]

* * * * *

Friday, June 17, 1955. 9:30 O’Clock A.M.

* * * * *

PANCHO BARNES

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

The Witness: I want to go back to the map, your Honor, because I have an overlay I wanted to show. I am sorry about the big map, but the size gives you a chance to see the detail.

Mr. Curran, would you mind being a map-holder again with Mr. McKendry?

We will try to go over this real quick. [149]

The Court: You take your time.

The Witness: Your Honor, just as a point of interest, coming back again to my statements, and I am still under oath, your Honor, I am testifying.

The Court: Yes.

The Witness: That there was a town of Muroc. We have on this map considerable detail as to what was there. We have the Air Base here, the buildings for it.

The Court: Now you are referring again to Defendants’ Exhibit No. F in this proceeding?

(Testimony of Pancho Barnes.)

The Witness: Yes, your Honor. And on this map it does show the Air Base in quite detail as it was at the date of this map which was—this is 1947, your Honor, that part. I have pasted the maps together in order to make the big map, because this is a Geodetic Survey, I think they call it, and they are very accurate maps. Now we have the Air Base as it was when they made this map in 1947, and the runway in 1947, and also they have considerable detail as to the town that was there in 1947. Now there are just little dots for the buildings, but I would like your Honor to scrutinize the outline of that town, because in 1949 Congress was told that there was no town.

Would you move it up real close so his Honor can see the detail of *these* little town. Have you got your magnifying glass there? [150]

The Court: Well, let the record show that I have examined the detail concerning the town of Muroc as it was in 1947.

The Witness: Does your Honor observe the buildings there noted on the map?

The Court: Yes.

The Witness: In considerable amount?

The Court: Well, the amount that is indicated on the map.

The Witness: Now, we have a big map here, your Honor, that is now before the Court. I have a little map I want to introduce into evidence, and it is so small a map that I can hardly figure it out myself, knowing the territory as well as I do. This

(Testimony of Pancho Barnes.)

little map—can we have a number for it, your Honor?

The Court: Well, do you have any objection, Mr. McPherson?

Mr. McPherson: I have never seen the map.

Miss Barnes: Oh, I am sorry.

Mr. McPherson: I would object to the map if the rider which is stenciled is included as part of the exhibit since it purports to be a directive from some committee, that calls itself the Air Coordinating Committee, meeting in Washington, D. C. under date of February 18, 1955. I don't know when the map was made or what it purports to depict as to time, and in the absence of some supporting [151] detail or some authenticity of the entries made on it, I don't see how it could be material to any issue before the Court.

The Court: It seems to me that the appendix that is attached to the map——

Miss Barnes: It is part of the map, your Honor.

The Court: Well, it isn't part of the map.

Miss Barnes: No.

The Court: It seems to me that it is completely hearsay and would not be admissible.

Miss Barnes: It is sent out to pilots. It is a document by which the Air Base lives, it is their authority and that we should stay out of certain territory with our airplanes, and it is sent out by the California Aeronautics Commission in Sacramento, and circulated as the law, as far as I am

(Testimony of Pancho Barnes.)

concerned, as a pilot, and as far as my husband is concerned as a pilot.

The Court: Well, I don't think that any proper foundation has been laid for the appendix, or whatever it is, that is attached to the map. I think there should be some indication the date the map represents.

Miss Barnes: It is entitled, "Owens Valley Restricted Area (see map opposite page)" and it is sent out and circulated to us pilots who fly our aircraft in that vicinity to stay out of certain places.

Mr. McPherson: As of what date? [152]

Miss Barnes: As of February 18, 1955.

Now, if we can ignore this map in court we should be able to ignore in our aircraft.

The Court: I don't think it is a similar situation.

Miss Barnes: To us it is, your Honor, because I want to show you something that is quite interesting and startling, your Honor, and it is part of my case.

The Court: I think you ought to be able to furnish some foundation before the Court receives the map. Does the map depict conditions as they existed in 105, '51, '52?

Miss Barnes: No, the conditions as they exist today. This case is going on right now.

The Court: And the appendix or appendage to the map is apparently issued by some agency of the State of California?

Miss Barnes: Because of——

(Testimony of Pancho Barnes.)

The Court: Is that right?

Miss Barnes: It stems from the Air Force, from the military services, from Washington. It has to do with what I am showing you, your Honor.

Mr. McPherson: May I examine the witness on voir dire?

The Court: Yes.

Mr. McPherson: Is it not true the map which you proffer was taken from a publication to which you are a subscriber or to which you are entitled to receive copies?

The Witness: No, your Honor. [153]

Mr. McPherson: And when you received the map as you proffer it, was the rider which is stenciled to the map dated February 18, 1955 a part of it?

The Witness: Yes, it was.

Mr. McPherson: It was received in this condition?

The Witness: Yes.

Mr. McPherson: Then my objection, your Honor, goes not to the authority or the support for the map but to the fact it relates to a condition existing the 15th of February 1955, as depicted by the Air Coordinating Committee meeting in Washington, D. C. and could not be binding upon the government in this case, and is not probative of any issue before your Honor.

Miss Barnes: It isn't a question of whether it is binding or not, your Honor, it simply means this, and I will explain the situation to you, and then

(Testimony of Pancho Barnes.)

you can make up your mind whether or not it should go in the evidence. But the situation, your Honor, is this, this little map, your Honor, in relation to this big map, the big map as you see is practically all of the Edwards Air Force Base, and the proposed part of the Edwards Air Force Base. That is the original base which is on this side of this line, including the Rogers Dry Lake, and the proposed and partly condemned and properly condemned, and the condemned unnecessary property—— [154]

Mr. McPherson: We ask the statement be deleted.

The Court: Well, I think that the statement it is unnecessary should be deleted.

Mr. McPherson: And I ask that she testify and not argue.

The Witness: All right. Anyway, we have the fence of the original Edwards Air Force Base on this side, and this takes in the territory which they propose to take in their condemnation.

Now, this little map shows in this little spot here at the bottom of the restricted area, as noted on the map, the part of this map——

The Court: Of the big map?

The Witness: Of the big map, Exhibit F, it shows that which is actually fenced and which is actually Air Base. The little map——

Mr. McPherson: We object to that, your Honor. It is an air navy map.

Miss Barnes: What do you mean?

(Testimony of Pancho Barnes.)

The Court: Just a minute, Mrs. Barnes. The small map will be marked for identification Defendants' Exhibit G for identification, and the Court will not receive it in evidence on the ground that no proper foundation has been laid for the receipt of the map, but you may have it marked Defendants' Exhibit No. G for identification.

So if you will have the clerk mark the map for identification. [155]

The Clerk: Also the appendix?

The Court: Yes, mark the whole for identification.

(The document referred to was marked as Defendants' Exhibit G for identification.)

Miss Barnes: On that particular map, your Honor, I want to make an offer of proof.

The Court: All right.

Miss Barnes: My offer of proof is this, your Honor, we are pilots, your Honor, both of us. We have our aircraft, we have our airfield which is here marked on the map. We both have been flying for many, many years, my husband something more than 20 and I some 28 now, I believe, and my son, who is another defendant in this case is also a pilot and flies in this area.

The government, the Air Force has not been satisfied with the taking of this territory. All they intend to do, as far as this is concerned probably, is fly over it.

Mr. McPherson: Object, if your Honor please, the witness obviously could not describe the *intend*

(Testimony of Pancho Barnes.)

of the Secretary of the Air Force or the committees of the government which controls our military operations.

Miss Barnes: Well, that was testified to under oath.

The Court: As I understand it, this is an offer of proof on your part. [156]

Miss Barnes: This is an offer of proof, in which I say that they weren't satisfied with buying this gigantic territory and flying in it——

The Court: Well,——

Miss Barnes: They have got to fly, your Honor, everywhere else in that country and exclude private aviation. In other words, what I am trying to bring to your mind is this, that suppose there is an alfalfa ranch in this area anywhere here, O.K., that is their particular property. We will say there is an alfalfa ranch next to it, that is not within the delegation, it is not meant for condemnation, they aren't going to condemn it, but they have a sort of inverse condemnation, and a lot of those people are going to find it out too down there, wherein they have stopped them flying. They have come and stopped them crop-dusting their crops in the little airplanes where they have got aphids in their alfalfa, and they have stopped that because they say no flying anywhere.

The Court: Well, Mrs. Barnes,——

Miss Barnes: For a territory I don't know how many times this big, but many hundred times this big.

(Testimony of Pancho Barnes.)

The Court: Well, Mrs. Barnes, this is not the proper time for argument.

Miss Barnes: I am not arguing, your Honor, I am making an offer of proof. [157]

The Court: Confine yourself to what you expect to prove in your offer of proof in connection with the small map which is the Defendants' Exhibit G for identification. Simply state what you expect to prove.

Miss Barnes: I expect to prove, your Honor, that the lands that they have taken from myself and other people in my neighborhood and outside of the original boundaries of the base have been taken to use to fly over, and I have testimony, your Honor, previous to this that they had no use, it was in Judge Beaumont's decision, to actually use it other than to fly over.

Now, they are not satisfied with taking that land away from us and putting us out of business, saying that they need that land or that land is necessary, but they have gone out and blanketed maybe one hundred times this much property to fly over and restricted the rest of us pilots and civilian pilots and the land owners, if they want crop dusting or want to fly an airplane into their own ranch and land, and there were several little landing strips within the various ranches. They are not satisfied to take all this away and put us out and then be satisfied to keep their airplanes in there, they have got to blanket a hundred times this much to fly in, and say we can't fly in it either.

(Testimony of Pancho Barnes.)

The Court: Well, in other words, what you are [158] offering to prove in connection with the small map is that it might tend to indicate that the subject property is not needed for public purposes, is that right?

Miss Barnes: Especially, your Honor.

The Court: All right.

Miss Barnes: Another thing, your Honor,—

The Court: Well, now, is that in connection with your offer of proof?

Miss Barnes: Yes.

The Court: Well, the offer of proof is rejected.

Miss Barnes: It is rejected?

The Court: Yes. It is in the record, but I do not think it is proper to be received by the Court in this proceeding.

Miss Barnes: Your Honor, they not only don't contain themselves to the Air Base for their testing, which was proved previously in this case, but they avoid flying their dangerous equipment around this particular proposition and air base and land which they have taken. They took it for a purpose for which they are not using it.

Your Honor, I live thirty miles north from here—

The Court: That is from the subject property?

The Witness: From the subject property, up in a secluded place and I am hearing more supersonic bombers than previously. I have an old rock [159] house over a hundred years old, and they have nearly knocked it down. It is built with rocks

(Testimony of Pancho Barnes.)

and mud but the walls are three feet wide or more, and they are coming up and flying there, testing over the property on which I am now living. Here is a portion——

The Court: Did you show that document to Mr. McPherson?

Miss Barnes: I would like it in.

The Court: That document will be marked Defendants' Exhibit No. H for identification.

(The document referred to was marked as Defendants' Exhibit H, for identification.)

Mr. McPherson: We object to its introduction, as irrelevant, incompetent and immaterial.

Miss Barnes: I think it is very relevant, your Honor, when they take property for the purpose of testing and then don't use it for testing, but go other places and test.

The Court: May I see this document?

Miss Barnes: Yes. This was pinned up on my ranch and the other ranches in my area, where I am now living. That was a bomb with a war head, they lost it; it was dangerous.

The Court: This Defendants' Exhibit H for identification, being a printed warning of a lost rocket is not received in evidence, but will remain marked for identification.

The Witness: Now, I am going to try to get [160] rid of this map, your Honor, but there are just a couple of fast points: The town of Muroc is here, the old Air Base is here, the mud mines were in this area some eight miles distant from the

(Testimony of Pancho Barnes.)

town of Muroc. The subject property was some more than eight miles from the town of Muroc, way down here.

The Court: I think we reviewed that pretty well yesterday.

The Witness: Well, I want the picture in your mind, your Honor. Then I want you to note especially, this was not drawn in by me, I have merely colored in the drawings on the map, and the airport, which is a fine large airport, commercial airport, was marked on the Geodetic Survey map.

The Court: On the subject property.

The Witness: On the subject property, the airport was marked on there, and at the time of the Congressional hearings was licensed by the United States Government, and by the State, the Department of Commerce.

I have here, your Honor,—

The Court: That is a commercial airport?

The Witness: As more than a commercial airport. Barnes Airport, Muroc, California, with the following ratings: a primary flying school, commercial flying school, flight instructor's school, basic ground school, advanced ground school. The date of this is May 22, 1950. This is licensed by the Department of Commerce, Civil Aeronautics [161] Administration, United States of America, Air Agency Certificate. In other words,—

The Court: Well, let's don't argue the case now; you are testifying.

The Witness: O.K. Now, this deposition here,

(Testimony of Pancho Barnes.)

your Honor, was in evidence before Judge Beaumont. It has these various certificates in it. Here is the airport permit under the State of California.

The Court: Whose deposition is that?

The Witness: That is E. S. McKendry's, Eugene S. McKendry's deposition. I would like to put it in the case. It was in evidence. It is in evidence. What I really want is the photostat of the licenses.

Mr. McPherson: We have no objection to the photostats of the licenses, but I think it is improper to receive Mr. McKendry's deposition when he is standing about a foot and a half from the witness at the moment.

The Witness: He wasn't when he made it.

Mr. McPherson: We make no objection to the licenses that were outstanding issued either by the State of California or the federal government.

The Witness: The federal government and the State.

Mr. McPherson: It would seem they go more to a matter of value than a right to condemn.

The Witness: No. We are just—— [162]

The Court: Well, let's——

The Witness: ——discussing one point. At the moment——

The Court: Well, just a moment.

The Witness: ——the last two photostats are what I am referring to.

The Court: All right. There is attached to the deposition of Eugene S. McKendry, filed in this court on December 18, 1953, photostatic copy of

(Testimony of Pancho Barnes.)

airport permit issued by the State of California under date of September 30, 1949, covering airport owned by Florence Lowe Barnes and operated by F. L. Barnes, at longitude 117-57-30, latitude 34-52-00, which I assume is the subject property.

Now, that permit is received in evidence and marked Defendants' Exhibit No. I, and——

The Witness: Just a minute.

The Court: Just a minute.

The Witness: Your Honor, will we put the big map away?

The Court: Yes.

The Witness: It will rattle for a minute.

The Court: All right. You go ahead.

And then attached to the same deposition is a photostatic copy of Air Agency Certificate No. 7145, issued by the United States of America, Department of Commerce, Civil Aeronautics Administration, issued to Bakersfield Airpark, whose business address is Barnes Airport, Muroc, California, [163] and the certificate covers the following ratings: primary flying school, commercial flying school, flight instructor's school, basic ground school, advanced ground school. The certificate was issued May 22, 1950.

Mr. McPherson: Is that school at Bakersfield?

The Witness: On the subject property, Mr. McPherson.

The Court: It says issued to Bakersfield Air Park, is that what you call it?

The Witness: No, that particular license was is-

(Testimony of Pancho Barnes.)

sued to Bakersfield Air Park because they moved their operation of their flight training on the GI Bill of Rights to the subject airport, because our airport, my airport was licensed and had these ratings and licenses and this work was going on, and it was just a question that I used to operate my own flying school back before the war, and it was just more than I could handle, so I leased out the flying rights and had an operator on the field.

The Court: Is it your statement, Mrs. Barnes, that this certificate which I have described covers the airport and air activities of the subject property?

The Witness: That is absolutely right. That subject property had to be licensed before they could get the—the operators who operated that field could get the GI bill of rights program.

The Court: Well, under the statement of [164] Mrs. Barnes this photostatic copy is received in evidence and marked Defendants' Exhibit J.

(The documents referred to were marked as Defendants' Exhibits I and J, and were received in evidence.)

The Witness: I wish to point out in my testimony, your Honor, that there was a flight school, a GI bill of rights government flight school in operation with the proper licenses, which was licensed by the government as well as the State, at the very time that the Congressional hearings were taking place in Congress. It was a government agency and was well known as existing by the government.

(Testimony of Pancho Barnes.)

The air field showed on all of the Air Force maps and they were perfectly cognizant of it. There was no one within the Air Force, at a higher level, that wasn't quite cognizant of the fact that that airport was there and operating.

Mr. McPherson: That is pure conjecture.

The Witness: Well, let's say in the higher flying circles; in other words, maybe some of the non-flying Air Force officers might not know.

The Court: All right, have you further testimony by yourself, Mrs. Barnes? I am simply talking about you as a witness now. [165]

* * * * *

Miss Barnes: I will offer them together, the two photostatic copies relating to the purchase of land of the first and of the second sessions of the 81st Congress.

The Court: Do you have any objection?

Mr. McPherson: No objection, your Honor. I wonder if I could have a copy. Do you have an extra copy?

Miss Barnes: These are the only copies we have. I think we can get copies.

Mr. McPherson: The only reason I ask, I have what purports to be a copy of the hearings of both the Appropriations and Armed Services Committees of the first and second session, and some of the pages Miss Barnes showed me are not in the copy furnished me, and I need those. I make no objection based on her statement that they are copies of the hearing.

(Testimony of Pancho Barnes.)

The Court: May I see them?

Miss Barnes: I have the photostat of the front pages of at least one book, I don't know if I have got both books.

The Court: The photostatic copy of——

Miss Barnes: I have here a cover, just to give the setup of the book, of the first session, because I got it with some other justification, and so forth, but they were justifications that Mr. McPherson has quoted but they didn't go through. [173]

* * * * *

The Court: Now, how about the other photostat?

There is received in evidence what appears to be photostatic copy of hearings before the Committee on Armed Services, House of Representatives, 81st Congress, First Session, on HR 4766, consisting of pages 3350, 3354, 55, 56, 57 and 58, and the document is received in evidence and marked Defendants' Exhibit No.—what is the number?

The Clerk: It was the same one we had before, wasn't it? The last two I put up there were K.

The Court: Which two?

Miss Barnes: Can't we have these under one exhibit, your Honor?

The Court: No. No. [176]

The Clerk: These two were offered before this last testimony.

The Court: Were introduced as Exhibit K?

The Clerk: They were, but I don't have them down, and I don't know which ones they were.

The Court: Well, here is——

(Testimony of Pancho Barnes.)

Miss Barnes: Well, we have this map for identification——

The Court: Just a minute.

The Clerk: No, we passed that.

Mr. McPherson: The little map was G.

The Court: Well, this document that I have described is Defendants' Exhibit No. K.

(The document referred to was marked as Defendants' Exhibit K, and was received in evidence.)

Miss Barnes: This one, your Honor, is the one where it says—I have the map here—this is the second session. This is the one that counts. This is the one from which the public law came. General Myers says “I have a map here that shows the existing reservation of 156,560 acres. Proposed acquisition 139,000.”

The Court: The Court will read them, Mrs. Barnes.

Miss Barnes: No, but Mr. McPherson has just said something I don't want to stick in your mind, your Honor.

The Court: Well, it is not——

Miss Barnes: “I thought you said 85,000. [177]

“General Myers: The total additional land we require is 139,000 acres. In this estimate we are able to procure 80,000 of that.”

And it was 80,000 that they made there their law.

The Court: This other document is received in evidence and marked Defendants' Exhibit No. L, photostatic copy consisting of what purports to be

(Testimony of Pancho Barnes.)

a Congressional hearing, consisting of pages 176, 177 and 178.

(The document referred to was marked as Defendants' Exhibit L, and was received in evidence.)

The Witness: Your Honor, you have seen a map with the Barnes airport, the large map of the Geodetic Survey, Exhibit F, I believe for the defendants, which showed an airport on the map, a large airport on the map. You have seen the air agency and the state permits for the airport with their various ratings. I want to testify that the same airport was noted, identified and shown on the world aeronautical charts, which charts are flown by all over the world.

Mr. McPherson, do you want to look at this map?

The Court: Do you seek to introduce the map in evidence, or are you satisfied with your statement that the airport does appear on the charts?

The Witness: I think it should be in evidence because the visual thing is far more convincing than to say it, your Honor.

Mr. McPherson: I was trying to find the date on this map. [178]

The Witness: Oh, it should be on the front here somewhere. September 10, 1953.

Mr. McPherson: No objection to the introduction of that map on the witness' statement concerning what it shows, except relating to the rating. I don't know that that appears on there except by interpretation.

(Testimony of Pancho Barnes.)

The Witness: No, I didn't say that, I said he had seen the others.

Mr. McPherson: The map is shown on World Aeronautical Chart, Mojave Desert, segment 404, issued September 10, 1953.

The Court: All right, the map is received in evidence then, since there is no objection, as Defendants' Exhibit M.

(The map referred to was received in evidence and marked as Defendants' Exhibit M.)

The Witness: The Barnes Airport was on the Aeronautical World Chart, which are government publications, for many, many years. The airport itself, I don't remember just when it got on the map, but the airport existed there on the ranch back as early as 1933. The field was known throughout the flying world, and when I say that I mean not just nationally, but internationally.

The hotel at the subject property was the finest in the Antelope Valley, and a very complete plant, which has been fully described, from a prima facie [179] standpoint, in the defendant's affidavit on file in this court. I don't think it is necessary, your Honor, for me to take time to reiterate my own affidavit, is it?

The Court: No, I think not. [180]

* * * * *

Friday, June 17, 1955. 1:30 O'Clock P.M.

* * * * *

The Court: There is a photostatic copy of a letter from the Corps of Engineers, U. S. Army,

(Testimony of Pancho Barnes.)

Los Angeles District, dated September 3, 1953, directed to Miss Pancho Barnes, Rancho Oro Verde, P. O. Box 37, Muroc, California, signed by Arthur H. Frye, Jr., Colonel, Corps of Engineers, District Engineer. The document is——

Mr. McPherson: P for identification.

The Court: ——marked as Defendants' Exhibit P for identification.

Now, the clerk had to step out to attend to some business in the clerk's office, so it will be marked as soon as the clerk comes back.

I might state that the letter which I have described, the photostatic copy is attached to the deposition of Eugene S. McKendry, filed in this court on December 18, 1953.

(The document referred to was marked as Defendants' Exhibit P, for identification.)

The Witness: That was taken into evidence, your Honor.

The Court: I beg your pardon?

The Witness: That entire thing was taken into evidence previously.

The Court: Yes.

The Witness: It was in the evidence itself.

Should I make an offer of proof on that?

The Court: Well, the letter pretty much speaks for itself, doesn't it?

The Witness: No, because by itself if one didn't realize the contents of it they would say, well, so she was refused a salvage offer, none was made up. It is as simple as that.

(Testimony of Pancho Barnes.)

The Court: Well, you state your offer of proof.

The Witness: Every other—I can't say that all appraisals always, but all the appraisals in that area included some salvage value when they were made——

Mr. McPherson: We object, may the Court please, the appraisals would be the best evidence, and I know that is not the fact, and there is no use getting into a hearsay tirade.

The Court: I think the appraisals themselves are the best evidence.

The Witness: The point was that I wasn't offered a salvage value, when everyone else that I [189] knew, and I knew everyone there, and I can state that under oath, that I know almost everyone and I know of no one who wasn't offered a salvage value, in that area.

The Court: And that is your offer of proof?

The Witness: Yes, and there was discrimination against me.

The Court: The Court will reject the offer of proof, but it is in the record.

The Witness: Now, your Honor, in the first day here in court on May 23rd, Mr. Joe McPherson did read some findings of the Honorable Judge Carter, in fact he spent a long time reading twenty odd findings, many of which were not pertinent to anything, but there are certain of those findings that I would like to read because the ones Mr. McPherson read were incorrect and had not been signed by the Judge.

(Testimony of Pancho Barnes.)

The Court: Were those the findings in the suit that you brought against General Holtoner?

The Witness: Against General Holtoner and Colonel Sacks.

The Court: The case which Judge Carter tried?

The Witness: Yes. Now, Mr. McPherson spent a long time here and much time that morning, and a large portion of what he read were not the findings from Judge Carter's case, and the ones that he read were only proposed findings and were not the ones signed by Judge Carter, and that is the only reason that I would like to now correct some [190] of the more pertinent findings. I don't intend to read them all, but there are three or four findings that were misstated by Mr. McPherson, and I would like to have them in the record in their correct form, being the ones actually signed by the Judge. [191]

* * * * *

Mr. McPherson: Just one moment until I describe it.—A conformed copy of the findings of fact and conclusions of law, in case 15,403-C, which was filed and entered by Mr. Smith, the Clerk, the date is punched out. I will get the date of the signature. Signed by Judge Carter on the 22nd day of September, 1954, and the like conformed copy of the judgment entered in the same case, filed on September 23, 1954, signed by Judge Carter on the 22nd of September, 1954. (Handing to Miss Barnes.)

The Witness: From the witness stand, your Honor, I state that these are the findings that were

(Testimony of Pancho Barnes.)

signed, but these were not the findings that were read by Mr. McPherson on May 3rd.

The Court: Well, it doesn't make much difference what Mr. McPherson read on May 23rd. You are satisfied that these [193] are the conformed copies of the original findings?

The Witness: I think these are true copies of the ones signed by the Court.

The Court: And also conformed copy of the judgment?

The Witness: That I wouldn't know, your Honor. I believe that this quite in order, your Honor.

The Court: Well, do you care to offer the conformed copies of the findings and the judgment as an exhibit in evidence?

The Witness: I think it should be there in view of the fact that the wrong ones were read, your Honor.

The Court: Well, I won't receive them on that ground.

Mr. McPherson: I suggest they be received. We will offer them if she doesn't.

The Witness: Do you want to offer them, Joe, then?

Mr. McPherson: We will.

The Witness: What I am trying to show, your Honor, is that I have made an allegation of harassment.

The Court: Well, let's do this first. Apparently

(Testimony of Pancho Barnes.)

there is no objection, so let me have the documents, will you, Mr. Eiland?

The conformed copy of findings of fact and conclusions of law, in action in this court, Pancho Barnes, Plaintiff, vs. Joseph Stanley Holtoner and Marcus B. Sacks, Defendants, No. Civil 15409-C, and—— [194]

The Witness: Then I would like to direct——

The Court: Wait a minute. And the judgment, conformed copy of the judgment in the same action, signed by James M. Carter, on the 22nd day of September, 1954, are received in evidence and marked Defendants' Exhibit No. Q.

(The documents referred to were marked as Defendants' Exhibit Q, and were received in evidence.)

The Witness: Your Honor, I think maybe you didn't get the number correctly there, as you read it; it is Civil 15403-C.

The Court: Yes, Civil 15403-C.

The Witness: I would like to direct your attention, your Honor, to finding number 9 on page 3.

The Court: Yes, if you will just wait until the clerk returns it to me.

The Witness: Oh, I am sorry.

The Court: You wish to direct my attention to?

The Witness: Finding number 11, at the bottom of page 3.

The Court: Starting at the bottom of page 3, yes.

The Witness: "That Joseph Stanley Holtoner

(Testimony of Pancho Barnes.)

made a statement to the effect that the plaintiff's ranch should be bombed; that said statement was made either in anger or in jest and without deliberation or intent to carry out the action implied therein; that the plaintiff's ranch was not bombed nor were any threatening acts or gestures made in furtherance of this verbal statement; but a fire of unknown [195] origin destroyed five buildings, including the ranch house on November 14, 1953."

The next finding, number 12, "That Marcus B. Sacks made a statement to the effect that the plaintiff's ranch should be bombed; that said statement was made either in anger or in jest and without deliberation or intent to carry out the action implied therein; that the plaintiff's ranch was not bombed nor were there any threatening acts or gestures made in furtherance of this verbal statement."

Now, it is just a question of where there is smoke there is fire, your Honor. It was necessary that this finding was made by the court, finding number 15:

"That there was no impropriety or immorality involved in the plaintiff's operation of her guest ranch, known to or condoned by plaintiff; that the defendants, or either of them, did not make any statements or insinuations to anyone," well, they say they didn't make any statement.

And finding number 16: "That the Department of Justice authorized the use of the Federal Bureau of Investigation in investigating certain

(Testimony of Pancho Barnes.)

aspects of this litigation; that the use of the Federal Bureau of Investigation was within the authority of the Attorney General of the United States; that the Court refused to take proof as to the course or nature of the precise investigation made by the Federal Bureau of Investigation."

Finding number 29—no, finding No. 19, page 6: "That the defendants refused to permit Constable Hodges of Mojave"—the defendants in this case were General Holtoner and Colonel Sacks—"refused to permit Constable Hodges of Mojave to make a service of process on General Holtoner at the Edwards Flight Test Center; that said action was the result of a misunderstanding of the existing law as to jurisdiction of the service of process on the part of Joseph Stanley Holtoner and Marcus B. Sacks; that in the preliminary proceedings in this action, involving removal to the District Court, the defendants were admonished and cautioned by this Court as to the manner in which they should submit to the service of process; that thereafter there have been no further misunderstandings as to the service of process; that after such admonition there has been no discipline, punishment, or recrimination against the civilian employee, Clifford Morris, who actually made service of process upon General Holtoner in a restricted area at Edwards Flight Test Center; that Clifford Morris was frightened and intimidated by the defendant Sacks at the time of his service of process on General Holtoner prior to the admonition of

(Testimony of Pancho Barnes.)

the Court above referred to, but there was no conspiracy between the defendants and Ed Carroll, or any other person, to frighten or intimidate Clifford Morris in connection with the service of process."

And the next one following, your Honor, number 20: "That Joseph Stanley Holtoner did ignore a subpoena directed to him from the Superior Court to attend a deposition; that said subpoena was ignored because the case was in the process of being removed to the United States District Court."

Over on page 8, finding number 29: "That there is no evidence submitted as to the net profits or losses of the plaintiff in the operation of her ranch activities prior to and during the period of the alleged acts complained of in plaintiff's Second Amended Complaint, but that plaintiff waived, at the start of the trial, any claim for damages in excess of \$10.00 from each defendant; that there was evidence that plaintiff's gross income dropped off after General Holtoner took command of the base."

In the conclusions of law, on page 9, conclusion 3: "That all of the activities of the defendants in conjunction with the plaintiff and/or her ranch activities were either actually, or honestly believed by them to be, within the scope of their duties as members of the United States Air Force."

These findings are interesting from two stand-points. One, to clarify the record over these other findings I have read, and one is there does show in there certain harassment, recriminations, and so

(Testimony of Pancho Barnes.)

forth, and this is offered, your Honor, in line of the fifth point, that there has been [198] discrimination against this place, discrimination as to the subject property, and the plaintiff because of the subject property. [199]

* * * * *

The Witness: Well, I would like to testify to this then, because I am not sure all of this is in the record.

At the subject property, at the time the subject property should have been, or is purported to have been taken under Public Law 564 by the Congress, that there were on the ranch at that time, besides and including the Airport, with a State license and a federal license; the dairy, I believe, was not then in operation but there had been a dairy under state license many years previous; there was a licensed hog ranch on the property, that would be a county license; there was a licensed hotel under the California Safety and Health Code, licensed by the State [200] of California; the restaurant was licensed by the County of Kern; and the liquor license was a state liquor license, on the property.

Now, your Honor, I would like to testify that the Wherry Housing is closer to the runways and the Air Base than the subject property, that it has many thousands of people in it, that it has public schools, public roads operated by Kern County, the schools are maintained by Kern County, the public library——

(Testimony of Pancho Barnes.)

Mr. McPherson: We have been over this three times.

The Witness: —operated by Kern County, and stores.

That has not been testified to. That has been in my allegations in writing, and it has been brought up, but we had no testimony yesterday, when I tried to get that testimony on yesterday with Mrs. Greene we didn't get it in. But there is a liquor store, a grocery store, barber shop, restaurant, beauty shop, and a large market, and a great many, various things comprising a complete town, which is, as I have called it in my allegations and my brief, a monopoly town all run by the Hal B. Hayes Corporation, in which the proprietors that have these various grocery stores, liquor store, and establishments of business, pay a ten per cent gross to the Hal B. Hayes Corporation, and are all under one thumb, so to speak.

I have an awful feeling, like when you go on a trip, [201] you think you have left your toothbrush at home, or something important.

Mr. McPherson: If you have left anything I will send it to you.

Miss Barnes: Your witness, Mr. McPherson.

Mr. McPherson: No questions. You may come down.

(Witness excused.)

Miss Barnes: Mr. McPherson, I would like to put you on the stand.

JOSEPH F. McPHERSON

called as a witness by the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your name for the record.

The Witness: Joseph F. McPherson.

Miss Barnes: Mr. McPherson, I was talking to Mr. Deutz, Civil Division, in your place down there——

The Court: Just a minute, I think you should identify the witness for the record, Mrs. Barnes.

Direct Examination

Q. (By Miss Barnes): It is so difficult for me to remember these things. Mr. McPherson, will you please state your name?

A. Joseph F. McPherson, Assistant United States Attorney in charge of the Lands Division, in Los Angeles. [202]

* * * * *

Q. Mr. McPherson, I want to refer to your brief in opposition to motion to dismiss, to set aside declaration [204] of taking, and judgment thereon in this case. Has your Honor a copy?

A. Which one? Brief in opposition——

Q. To the motion.

The Court: This was filed——

The Witness: Opposition. Yes, I have a copy before me.

The Court: Just wait and let me see if I have it.

The Witness: Filed June 13th.

The Court: I have it too, opposition to motion

(Testimony of Joseph F. McPherson.)

to dismiss or motion to set aside declaration of taking and judgment thereon, filed in this court June 13th, 1955.

Miss Barnes: Yes, your Honor.

Q. Now, Mr. McPherson, I wish to refer you to the first page, line 29. You have written in there Air Materiel Command. Do you wish to correct that?

A. Well, let me see my affidavit. That could be a mistake.

Q. Well, you have in the next paragraph Air Research Command.

A. It could be a mistake.

Q. Well, it is a small thing but I wondered if you wished to correct it.

A. That was taken from the Congressional hearing on the application, and I think that it has since been placed under the other command, but at the time the hearings were [205] held on the bill which authorized the acquisition of your property it was under this command, and I think that is what I probably had in mind.

Q. But it is now under the Air Research and Development?

A. That is my understanding.

Q. In paragraph 3, at line 19, it says the base comprises the area of approximately 300,000 acres, being developed in accordance with the master plan approved in 1950.

A. Yes.

Q. By whom?

A. What do you mean, by whom?

(Testimony of Joseph F. McPherson.)

Q. Well, who approved the master plan?

A. I have it here and the approvals are shown on it.

Q. Well, do you mean Congress, by any chance?

A. Well, it was preliminarily, and the document many times has been submitted to the Congress, but the approval would be by the armed services.

I have brought here, your Honor, so we can put this thing to rest some time, the preliminary master plan of the base as it existed and as it was submitted apparently to the Armed Services Committee at the time of the much disputed Myers testimony. It was originally classified. It has been unclassified, and I think we may mark this copy as an exhibit, with leave to substitute a copy and withdraw [206] it if such is the need of the armed services.

Miss Barnes: I am not sure that has what——

The Witness: Just one minute, please. You asked a question and I am answering it.

Miss Barnes: Well,——

The Witness: Now, I have——

The Court: I think we better move this along orderly. The document described by Mr. McPherson will be marked Government's Exhibit No. 2 for identification. That is the one that Mrs. Barnes has now.

Miss Barnes: Would you say you are relying——

The Court: Let's have the document marked as Government's Exhibit No. 2 for identification.

(Testimony of Joseph F. McPherson.)

(The document referred to was marked as Government's Exhibit No. 2 for identification.)

The Witness: As a part of the same answer I have caused to be sent here a certified copy of the report to accompany the general master plan of Edwards Air Force Base at Muroc, California, which is certified as being a true copy by Brigadier General C. P. Brown, Deputy Assistant Chief of Staff of Installations, and——

Miss Barnes: What date?

The Witness: Just one minute. The approval was in a series of dates by the Base Commander, on February 21, 1950, Colonel John G. Griggs, Secretary, Command Planning [207] Board, Headquarters Air Materiel Command, in March of 1950, and General James B. Newman, Jr., Director of Installations, Headquarters Air Force, May 15, 1950, and a very large tome which contains the pictorial plan in detail of the base, which is likewise certified to by General C. B. Brown, Brigadier General, and which shows approval by the same officers, and also on what purports to be the same dates. The certificate of execution is attached to and bound into the volume.

The certificate further is to the effect that the attached master plan is still in effect, and after diligent search no other master plan for Edwards Air Force Base, approved by Headquarters United States Air Force is found to exist in the records of this office.

Of this book, in order to shorten it, in my opin-

(Testimony of Joseph F. McPherson.)

ion from having examined it—of course the proffer therefore will be limited subject to defendants' examination and modification, if she wishes—there is actually only one map of any consequence, so far as this case is concerned, and it is to be found in the book labeled, in the block captioned General Master Plan of Edwards Air Force Base, tab A-2——

Miss Barnes: Mr. McPherson, pardon me just one moment. Isn't this practically a replica of the other two maps you brought along? [208]

The Witness: Just a moment. According to the index tab A-2 is the vicinity map. I have had reproductions in kind made of that map, which I would like to substitute for this sheet of the big book, and return this valuable document to the Air Force. I have a copy for the Court and also one for Miss Barnes.

The Court: Now, the first, I mean the smaller document you referred to relating to the master plan, where is that?

The Witness: That is the preliminary master plan.

The Court: Yes.

The Witness: That is referred to in the Congressional hearing.

The Court: Well, that is No. 2 for identification, is it not?

The Witness: Yes, your Honor.

The Court: Now, the tome is to be marked Government's Exhibit No. 3 for identification.

(Testimony of Joseph F. McPherson.)

The Witness: Well, it should be 4, because the detailed report would be 3.

The Court: Oh, that is what I had in mind. The detailed report of the master plan is marked Government's Exhibit No. 3 for identification.

The Witness: With leave to substitute a copy if need be.

The Court: Yes. Will you hand that to the clerk so he will get it marked without danger of error.

(The document referred to was marked as Government's Exhibit No. 3, for identification.)

The Court: And then the tome.

The Witness: I would like to have marked only, at the moment, the map identified as tab A-2, which deals with the real estate, and if any additional portion of the book is required it, of course, may be offered. But I do not think it would serve any useful purpose to put in this entire document.

The Court: The map then that is labeled Tab A-2——

Miss Barnes: Well, what I want to ask——

The Court: ——is marked Government's Exhibit 4 for identification, and you may substitute a true copy of that map in place of the original.

The Witness: And to complete the proffer I hand the clerk a——

The Clerk: This is 4 for identification?

The Court: Yes.

(The document referred to was marked as

(Testimony of Joseph F. McPherson.)

Government's Exhibit No. 4, for identification.)

Miss Barnes: Mr. McPherson,——

The Witness: Just a minute. Let's finish marking the documents.

Miss Barnes: O.K.

The Court: The substituted map will be marked as [210] Government's Exhibit No. 4 for identification. And you have a copy of the map, Mrs. Barnes? You have been furnished a copy?

Miss Barnes: Yes, your Honor.

The Court: Of Government's Exhibit No. 4, for identification.

Q. (By Miss Barnes): Mr. McPherson, you have just proffered certain exhibits for the government. A. Yes.

Q. You have also just brought in a map that is purported to be a replica of the one in the original master file? Is that true? A. That is correct.

Q. You, I believe, made the statement that was probably the only thing in the book that would be of interest to the subject property, is that correct?

A. Well, that's my opinion, Miss Barnes. I have inspected it, and we are dealing here with the matter of acquisition of real property for inclusion in the perimeter of the base, and the map which I have prepared the substitute copy for is the reproduction of the real estate sheet in the large assembly there.

You are at liberty to examine the book, and if you want any more we will offer it. [211]

(Testimony of Joseph F. McPherson.)

Q. No, I want to know this: Is there anything in that whole master plan that applies to the subject property other than there happens to be—the subject property happens to be located within the confines of the map?

A. No, there is no special treatment of your property. It is just found within the perimeter as depicted on Exhibit 4 for identification.

Q. In other words, we may rely on that so that we can let the valuable exhibit go?

A. That's my impression, but I would prefer that you examine it yourself, in view of your attitude. That is my opinion.

Q. Well, I am interested, of course, in what the Court knows, and what I am anxious to do is to bring home to the Court that there is nothing regarding the property or any use or anything that the government has for the property, other than the fact that it is on that map.

A. Oh, yes, the report deals specifically with each structure on the base, and what it is designed for, and the purpose of its use.

Q. That's fine. Now, you said on the base. Does it have anything to do with the subject property, other than the map as it stands? You have answered it once.

A. As I understand it, your property is not given any special treatment; it is a portion of the large area [212] which is under treatment in the plan.

Q. But there is nothing in that plan that again

(Testimony of Joseph F. McPherson.)

refers specifically to the property? I mean, I am asking you, is there?

A. Not that I recall, not to your property especially.

Q. Yes, just our property, the subject property.

A. That is my understanding.

The Court: Do I understand, Mr. McPherson, that Government's Exhibit No. 3 for identification, which as I understand is the detail of the master plan, does not specifically mention the subject property?

The Witness: That is my recollection. If it does, I don't remember seeing it. It deals with the entire area and the several features of improvements that are to be put there and what they are to be used for.

The Court: And is the subject property specifically mentioned and designated in Government's Exhibit No. 4 for identification, the map?

The Witness: That appears on so many, I don't know whether it is on that one or not. (Examining.)

Yes, your Honor, it is on Exhibit 4 for identification, as the Barnes Airfield, and just below it the legend "to be abandoned."

Q. (By Miss Barnes): Was this map shown to the 81st Congress? [213]

A. Well, I don't know whether it was or not, Miss Barnes. I would doubt if it was. The map in the preliminary plan purports to be the one that was shown to the Congress. A perimeter corresponding in exact detail with the perimeter as is

(Testimony of Joseph F. McPherson.)

shown on Exhibit 4 for identification was shown to the Committee.

Miss Barnes: What was that?

(The answer was read.)

Miss Barnes: I don't remember, did you put one of these in the record?

A. That is in the preliminary master plan, the document which you are now showing me is one of the maps, reproduction of one of the maps——

Q. That might have been one?

A. ——that is in the preliminary plan.

Q. Is this the one you said might have been shown to Congress?

A. It is the one I think was shown by General Myers, and referred to by him in his testimony, and when the opportunity is presented I will show the Court why I think so, though, for the record, General Myers is in Europe, we were not able to contact him. His associate in the presentation to the Committee was General Spivey; he was contacted and stated he had no recollection of the map and was not able to identify it. [214]

The Court: That map is part of Government's Exhibit No. 2, is it not?

The Witness: Yes, your Honor.

Q. (By Miss Barnes): I want to come to the question I was asking, in your brief in opposition you say "at the present the base encompasses an area of approximately 300,000 acres, being developed in accordance with the master plan approved in 1950." A. That is correct.

(Testimony of Joseph F. McPherson.)

Q. I want to know exactly who approved it, and would that be, for instance, Colonel S. A. Gilkey?

A. No. The master plan approved in 1950 is the big tome from which Exhibit 4 for identification was taken. The approval of that master plan is shown by the certificate attached to it to have been made by other and different officers than those who approved the preliminary master plan.

Q. Now, when you say approved, Mr. McPherson, you are speaking of Air Force approval?

A. Certainly.

Q. You are not referring to Congressional approval? A. Not necessarily.

Q. Well, are you referring to Congressional approval?

A. I do not know that the Congress ever approved it, though they approved portions of it, they approved the land [215] acquisition section.

Q. When you say they did, you mean all of it?

A. Yes.

Q. Of course, we are dealing now with Public Law 564, because what they may have approved in later years I am not positive of. However, you made some statements to his Honor, the Court, that the Secretary of the Air Force could claim anything that was necessary and that was it; in other words, you were sort of pointing out to the Court it did not really have jurisdiction in the case, such as this.

I want to refer to your opposition—your Honor has a copy there—page 2, paragraph 4, which says, starting at line 23: “So far as is material to this

(Testimony of Joseph F. McPherson.)

proceeding the enlargement of Edwards Air Force Base involving among others this condemnation results from the determination of necessity made by the Secretary of the Air Force under and pursuant to and among others the Act of June 17, 1950, Public Law 564, 81st Congress." The statutes come after that.

Now, several public laws are cited, which I believe are general, don't refer to the subject property, but are general condemnation laws. These defendants are not doubting the right of condemnation nor the proper laws under which it is usually condemned. We are only interested in the subject property and the statutes regarding it, under which it is [216] purported to be taken.

Now, what I am bringing up now is, Mr. McPherson, at line 26, you say "the Secretary of the Air Force under and pursuant to," in other words, you recognize there that there is a limit to his scope of authority and he is bound by the powers he is given by Congress, don't you?

A. It is not my province to express an opinion on the Secretary of the Air Force's authority. I should say that, as most others will tell you, of necessity he has no power except such as is given him by the Congress of the United States. [217]

* * * * *

Q. (By Miss Barnes): Just one question I would like to ask Mr. McPherson: Who did make the changes on the declaration of taking?

A. I don't know who actually made them. I

(Testimony of Joseph F. McPherson.)

understand [229] they were made at the direction of Mr. Weymann, who was proceeding under the authority of the telegram from the Attorney General, or Assistant Attorney General, a copy of which I furnished you the other day.

Q. Was there any authority ever from the Secretary of Air who made the paper?

A. None would be required, and as far as I know no express authorization or direction was given to him, but immediately the separate suit was filed the preliminary transcript was prepared in accordance with our regulations, sent to the Attorney General, and he thereupon wrote the title opinion to the Secretary, a copy of which was furnished you, and he accepted it and acted upon it.

The entire chain of correspondence having to do with the filing of the separate suit, and the proceeding involved in the acquisition of your land, is encompassed in that affidavit which I furnished you, and I think I have the whole file there and you are at liberty to inspect it for that purpose. I think we gave you a copy of all of the documents in our file that bear upon the authority to proceed against your property by way of separate suit.

There is one additional matter which should be mentioned——

Q. Was there ever——

The Court: Wait until Mr. McPherson finishes.

A. ——Declaration of Taking No. 3, a preliminary copy [230] of which we had received, which was also prepared for filing in 1201-ND, actually

(Testimony of Joseph F. McPherson.)

was split in two again, and is on file in this court in two other separate suits.

Q. I have them both here.

A. The numbers of which I have forgotten, the James B. Hill case, and the other is the Mojave Mud company.

Q. They didn't make any declaration of taking in that case.

A. The authority was given from Washington for the transmittal of the D.T. to us.

Q. How many months later was the Mojave Mud Company suit filed as of, just approximately?

A. I didn't hear you?

Q. About how many months later?

A. I have forgotten, but it could be readily ascertained by examining the file here.

Q. Was a certified copy of the declaration of taking as filed ever sent back to the Secretary of Air or to the Attorney General?

A. Well, I couldn't say. I believe there would be, Miss Barnes.

Q. There is a letter here that says it wasn't—I mean, sort of—has his Honor got copies of these files?

The Court: Yes, I have. You mean the affidavit?

Miss Barnes: Well, not exactly the affidavit, letters. [231]

The Court: Well, they are attached to whose affidavit?

Miss Barnes: This is attached to the affidavit of Mr. Lavine.

(Testimony of Joseph F. McPherson.)

The Court: I have it.

Miss Barnes: They have it marked Exhibit 9. It is a letter of March 3rd: "Certified and plain copy of complaint, certified and plain copy of decree on declaration of taking, duplicate original certificate of the clerk evidencing the deposit of \$205,000."

But there is no certified copy of the corrected declaration of taking ever sent back, that I can find any record of. A. Well, I——

Q. Can you show me any?

A. I don't know that there was any. Ordinarily we would not transmit the declaration back to the Attorney General, because he keeps one himself and conforms his own, and he transmits them to the field. The procedural operation changes quite frequently, as I have already explained to you on previous occasions. The department has now come around to our way of thinking, and they no longer enter decrees on the declaration of taking, the declaration itself is recorded rather than the decree.

Q. I put that in my brief, hoping his Honor would give us a little something on it, some of the attorneys in [232] Los Angeles say a little blurb on the subject, because I think that decree or judgment or declaration is an un-American thing.

A. I think it is an unnecessary act.

Miss Barnes: I think——

The Court: Let's move along here. We are going to have to conclude this matter this after-

(Testimony of Joseph F. McPherson.)

noon, and Mr. McPherson may want to offer some evidence on behalf of the government.

Mr. McPherson: Yes, I have some affidavits.

The Court: Have you any further questions of Mr. McPherson?

Q. (By Miss Barnes): Would you say then, Mr. McPherson, that they have ever either in Washington—in the United States Attorney's office or the Air Force headquarters, have ever had a true, corrected copy, as we have seen it, of the declaration of taking?

A. I wouldn't have any opinion one way or the other.

Q. You have no knowledge or records that a true corrected copy was ever sent to them?

A. Not according to my file there wasn't, and I don't know whether the District Engineer transmitted it, but we have a letter showing that he transmitted the correction as far as the division, but whether they went on to Washington with it or not I don't know. [233]

Q. It is interesting that you mention that. They say we are transmitting the first page as corrected. Why not the second page? That is also corrected. Can you explain that?

A. Well, that is more or less an innocuous thing, they just struck out the word "amendment" or "amended" so that would not cause the necessity.

Q. Mr. McPherson, can you tell me as an attorney if you were making a complaint, an amended complaint, wouldn't there be something in that

(Testimony of Joseph F. McPherson.)

amended complaint that would state that it was an amended complaint, that it was to be included or appended to another case, with a **complete case** with the amount of acreage, and that so many acres were going to be added under the other title? Wouldn't it show in some way?

A. As a matter of fact, there are two groups of cases that would fit your question; one typical example would be Whittier Narrows, there is about 1,000 or 1,500 parcels in that case, it becomes very cumberson. I think we have filed today 58 or 60 D.T.'s in that case, declarations of taking, and each one has required an amendment to be made of the complaint. The paper work is extremely burdensome, and unnecessary.

In the Chocolate Mountain acquisition we had some 3,280 parcels, I don't know how many amendments there were in that, 13 or 14 amendements are common practice. We have [234] been trying to stop that, and beginning with the Edwards case I think you will find no amendments that have resulted in additional property; each separate acquisition is a separate suit. There are about 18 or 20 now pending for the Edwards acquisition. That is the method of operation.

Q. I am not sure you didn't get a little off the point on that question. The question was not for an example of what you did with the Whittier Narrows, or anything, or how you add these things. I am saying, as an attorney, in a complaint, if you were going to file a paper that would look contra-

(Testimony of Joseph F. McPherson.)

dictory, such a declaration of taking would if it suddenly turned up with extra acres that shouldn't have been there, wouldn't there be something on that declaration of taking, some paper was made, if it were intended to be filed as a declaration of taking No. 2, not on property already in that case. In other words, there could be cases where such a suit came up or something about a piece of property which was already involved, where you might want to correct or remake something about a parcel of property that was already taken, so to speak, in other words, there was some irregularity, but where you are adding property wouldn't—wouldn't that complaint in order not to confuse the issue, say this is added land to be in this declaration of taking on such a case number, bearing such a number of acres as a title, wouldn't that [235] show in there somewhere?

A. No, as a matter of fact, if you will think about it for just a minute—I don't know, but I would wager it is true, if you look at case 1201-ND and count the acreage that was condemned in it, you will probably find there were 1700 and whatever that was——

Q. 1710.73.

A. ——and had this additional 360 acres been put into that case by way of D.T., the caption of that suit would not have changed.

Q. I understand that.

A. If you add the 360——

Q. I understand that, but then if I took as I

(Testimony of Joseph F. McPherson.)

did the 1710.73 acres of land and went down through it and took all of the land comprising this and added them up very carefully and found out they totaled exactly 1710.73 in acreage, in other words, it added and that was it. Now when you suddenly put in an extra 360 acres and somebody wanted to add it up, they would say there is something wrong about this, it doesn't total. Wouldn't there be something in the complaint that would show that you were in this case deviating from the number of acres in the title?

A. Well, I wouldn't know, because there would be no rule governing it. I think the thing that you should know, to understand what prompted this operation, is a simple [236] division of authority in the government. Property is to be taken, what estate is to be taken, and when it is to be taken, is a matter for the division of the Secretary of the Air Force, and——

Q. And what they are going to do.

A. ——the proceeding in which it is to be acquired is under the exclusive control of the Attorney General of the United States, and he is in no sense required to amend the complaint or follow a directive or requested proceeding of the Secretary of the Air Force, or anyone else. He is the sole judge of how he shall go about doing it.

Q. If he is the sole judge, the Attorney General of the United States, as to changing without consulting them the documents of anybody in the

(Testimony of Joseph F. McPherson.)

United States, for instance, that he wants to change a document?

A. Oh, I don't think he would make a substitution of a parcel or any substantive change in it, but to conform to the caption of a document which is prepared for our convenience rather than the Air Force——

Q. What I am getting at——

A. ——is of no consequence.

Q. What I am getting at now, Mr. Huggins signed a declaration of taking No. 2 under an impression that that particular property was needed, I think, for immediate construction, and was in that which should have been what [237] they called priority No. 1. Now that was evidently his intention, from what I can get, and I can point that out right from your own documents. Now, other people decide later that maybe this shouldn't be done, so they just, I would consider it more or less in an arbitrary and capricious manner, X out and change over what he signed, and they don't even get any authority from him or notify him, or even show him a copy or even say we did this.

A. He evidently got a copy. I don't know from whom, but he eventually got a copy.

Q. Well, can you prove that, or is that hearsay?

A. I know that to be the case; I couldn't prove it, but I could eventually find the one that he got, because we sent it right back to the Engineers and they sent it out of here to the division, and I suppose if we go to the trouble, the division——

(Testimony of Joseph F. McPherson.)

Q. In other words, you believe that Edwin V. Huggins knows who changed it?

A. No, E. V. Huggins doesn't know, but his office knows it.

Q. Well, he is the one that signed it.

A. I doubt if he knows he signed it.

Q. There we have an interesting point. Do you want to cross examine yourself, Mr. McPherson?

Mr. McPherson: I don't think there is any occasion. [238]

The Court: Very well.

(Witness excused.)

Now, do you have any more witnesses, Mrs. Barnes?

Miss Barnes: I don't believe it is necessary, your Honor.

The Court: Now, are you ready to rest so far as your motions are concerned?

Miss Barnes: I may still argue?

The Court: Oh, yes. I am talking about testimony.

Miss Barnes: Yes, your Honor.

The Court: Well, the government?

Mr. McPherson: Yes, I have a few documents that I want to introduce. Where is my file?

The Court: Mr. Eiland, these affidavits of Richard A. Lavine should be filed, and of August Weymann.

Mr. McPherson: Now, first, your Honor, I have given Mrs. Barnes, two copies, one colored and one uncolored, of the map which is attached to the Gov-

ernment's Exhibit No. 2 for identification. There is nothing peculiar about this map, except there is noted on it Tracts A, B, C, D, E, F, G and H, with the acreage, and I have had a copy of that colored so that the segments are easily distinguished, and I should like to have it marked 2-A for identification, as a part of that exhibit, and as modified, and offer it in evidence. [239]

The Court: The map is received and marked as Government's Exhibit 2-A for identification.

(The map referred to was marked as Government's Exhibit 2-A for identification.)

Mr. McPherson: I would now like to offer in evidence now the documents now marked for identification as Government's Exhibits 2, 3 and 4.

The Court: And 2-A?

Mr. McPherson: And 2-A.

The Court: The documents are received in evidence and given the same numbers.

(The documents heretofore marked as Government's Exhibit 2, 2-A, 3 and 4 for identification, were received in evidence.)

Mr. McPherson: Now, at the conclusion of this hearing may I withdraw the Air Force copy of the report to accompany the master plan, which was marked as Government's Exhibit 3? I think it will serve no useful purpose to reproduce it, unless Mrs. Barnes wants it.

Miss Barnes: What is it intended to do as far as the Judge is concerned?

Mr. McPherson: Nothing, except it was a part and parcel of the proffer and I offered it complete.

Miss Barnes: In other words, it is of no value to any decision he may make?

Mr. McPherson: Not in my opinion. If I had offered the [240] other book and you had said it was not complete I would have been embarrassed, so I offered the whole business.

Miss Barnes: If it is nothing that will influence the Court in any respect one way or the other, then——

The Court: Well, does the government——

Miss Barnes: Well, does it pertain to the subject property in any manner?

Mr. McPherson: No.

The Court: The government's exhibit then, marked 3 for identification, is that correct?

Mr. McPherson: 3 for identification.

The Court: May be withdrawn and returned to the agency producing it.

Mr. McPherson: Now, I should like to offer a photostatic copy of the hearing, *which may* cumulative of what Miss Barnes offered this morning, but I haven't had a chance to proofread them, and I think we can do it quicker this way, as it contains what I want, of the first session of the 81st Congress, being page 3277 and then jumping to page 3350 and those pages which follow in the assembly. The purpose of offering page 3277 is simply to show the date and time and place and the Committee which was hearing the matter. I offer this as the Government's next exhibit in order.

The Court: You know what the document is?

Miss Barnes: Yes, your Honor, I do; I understand the [241] purpose, your Honor.

Mr. McPherson: It may be a copy of yours.

Miss Barnes: They are. The only thing is, I want the notation made there that they have to do with the 81st Congress, the first session, and the justification here was not allowed by the 81st Congress, the first session, nothing came of it, and the——

Mr. McPherson: You can argue that later on.

Miss Barnes: I want it noted here, because I don't want the Court misled.

The Court: The document is received and marked the Government's Exhibit No. 5 in evidence.

Mr. McPherson: Of course, I do not agree it was not authorized. I simply wish to direct the Court's attention to one small excerpt in the exhibit, so that you will understand my next proffer. On the second page of the assembly, which is letter 3350, at the bottom of the page, is the entry RD-38-Acquisition in fee simple 139,000 acres of land in segments A, B, D, E, F and G of the land acquisition program of the master plan. You will note the numbers are in sequence except C.

Now, if you will examine the map which is attached to the preliminary plan, which I had duplicated in color for you, the segments outlined by letter, it will be observed to be the same in sequence, though bearing no [242] legend, but separated by colors on Defendants' Exhibit B.

(The document referred to was marked as

Government's Exhibit No. 5, and was received in evidence.)

Mr. McPherson: Now, by using some of Miss Barnes' sixth grade arithmetic, we will produce another startling——

Miss Barnes: You are being sarcastic.

Mr. McPherson: That is correct. I have had the segments of the map attached to Defendants' Exhibit B counted by sections. The Court will observe there are certain cross hatched sections, which represent the public domain in the area, and from the legend on the map the number of previously and already acquired direct purchase tracts, and the remaining sections in the exhibit, which includes, for the Court's information, the area legend Barnes Airfield in Section 20, total 139,356 acres. So also on Defendants' Exhibit C, which was——

Miss Barnes: Would you please, Mr. McPherson, give the date of the map?

Mr. McPherson: Well, it is part of your exhibit, Miss Barnes, it was introduced as Exhibit B. I thought you knew what you were doing.

Miss Barnes: Well, are you reintroducing it?

Mr. McPherson: No, no.

Miss Barnes: Well, will you please state to the Court what the date is?

Mr. McPherson: April 29, 1952. [243]

Miss Barnes: And will you state the priority number in which the defendants' property is?

Mr. McPherson: Priority No. 1.

Miss Barnes: Wait a minute. In 1947. They have changed it. O.K.

Mr. McPherson: Now, on Miss Barnes' Exhibit C, which is the December 27, 1950 exhibit, which is attached to the 41,555 acres, which according to her version of that exhibit represented the mud mines and the area for the relocation of the tracks and lands in the vicinity, was by using the same method, that is 640 acres to the section, does include the Barnes property and it is shown on the map, and it is the same which accompanied the preliminary exhibit, and on that map Miss Barnes' property is shown in priority No. 4, rather than No. 1, so that——

Miss Barnes: Would you give the date of that map?

Mr. McPherson: The map is the same, Miss Barnes, 1947. I don't think you mean what you say when you ask for the date of the map. The date of the exhibit to which the map is attached is, base letter, is December 20, 1950.

Miss Barnes: And the priority at that time?

Mr. McPherson: Was No. 4. Now, the base letter on the map which you, under your breath, said had been changed, and which of course has not, is Exhibit B which was dated in 1952, and in that letter you are in priority No. 1. [244] So I don't think the priority would make any difference.

Miss Barnes: Yes, I think it is very important.

Mr. McPherson: The only purpose I have in calling the Court's attention to the fact, it doesn't make any difference whether we are proceeding here on 139,000 acres or the 80,000 acres or the 41,000

acres. In either case, Miss Barnes' property was included.

As an additional exhibit on the same subject, I have procured from the Air Force and offer, and hand Miss Barnes a copy, a letter from the Deputy Chief of the Real Estate Division at Washington, dated May 20th, addressed to myself, transmitting a further copy of acquisition project No. 20, which is also referred to in this previous exhibit, which I will go back to in a moment.

The Court: Letter dated May 20th, what?

Mr. McPherson: Letter of transmittal to me of May 20, 1955. Now, the purpose of this proffer is to show that attached to it, in the office of the Headquarters of the United States Air Force is the Senate and House approval by the Chairman of the Military Affairs Committee, or the Committee on Armed Services it is now called of both Houses, of acquisition project No. 20, which is Edward Air Force Base, and is shown to be such on these enclosures. This authorization is given on this acquisition report, which I also think has confused Miss Barnes somewhat in her [245] presentation.

You will remember that when I was analyzing for you the issues and statutes involved, I made reference to Public Law 155 of the 82nd Congress. That law, together with one other which I have mentioned, which citation I have forgotten, relating to the Air Force, required submission of reports to the Congressional Committees of their activities under these rapidly expanding programs. Now, the

submission of the report to the Congressional Committee, which was required by Public Law 155 is by no sense an inference or contention that the acquisition was under 155, simply the report was required. And if you will examine both Exhibits B and C, as offered by Miss Barnes, and the exhibit which I now proffer, you will find that the authorization act relied upon and approved by the congressional committee, were Public Law 564 and 910 of the 81st Congress, and Public Law 155 of the 82nd Congress, and the appropriation law is as I gave it to you originally.

I ask that document be received in evidence.

The Court: It will be Government's Exhibit No. 6. Do you have a copy?

(The document referred to was marked as Government's Exhibit No. 6, and was received in evidence.)

Miss Barnes: Yes, your Honor. I think it is already in evidence, almost the same document. [246]

Mr. McPherson: It is in evidence without the express approval of the Senate and House.

Miss Barnes: Well, it says approved by the House and Senate.

The Court: Government's Exhibit No. 6 in evidence.

Mr. McPherson: I should like then to offer in evidence an affidavit of General Holtoner, which bears upon an allegation made in the affidavit filed by Miss Barnes concerning activities of the General. Suffice it to say they were categorically denied.

The Court: Do you want to submit that as an exhibit?

Mr. McPherson: Well, I just offer it in evidence. It is an affidavit.

The Court: Yes.

Miss Barnes: May I read it first to see if I want it in evidence?

Mr. McPherson: You don't have any choice in the matter.

The Court: Is it a long document?

Ordinarily these motions of this type are heard upon affidavits. The affidavit should be filed. You have furnished a copy to Mrs. Barnes?

Mr. McPherson: Yes.

The Court: And likewise the affidavits of Mr. Weymann and Mr. Lavine will be filed. [247]

* * * * *

The Court: Well, Mr. McPherson, I recognize, of course, that Mrs. Barnes has not had an opportunity to read over some of the affidavits filed late this afternoon, and she feels that she may want that opportunity, and I don't want her to feel that this Court is by any order excluding her from presenting matters that she feels might be relevant.

Mr. McPherson: But even in her supplemental affidavit if she raises additional matters, we would have to request you to extend the time until after July 15th.

The Court: Yes, there is no question you would be entitled to that. [282]

* * * * *

But I will give you, Mrs. Barnes, until July 1st to file counter-affidavits, and I will give the government until, say, July 20th, 25th?

Mr. McPherson: 25th would be better.

The Court: And the reason I give the more time is because Mr. McPherson won't be back in his office, apparently until about July 15th. So I will give the government until July 25th, to file——

Miss Barnes: That is O.K. but they do have another attorney on the case. Mr. Lavine is on the case, and then he told you he made all that he read in court.

Mr. McPherson: Mr. Lavine is doing his annual stint in the Air Force at the moment.

The Court: That will be the order. Then the matter will stand submitted upon the filing of the [283] affidavit of the government. If the government elects not to file counter-affidavits, they will so advise.

Mr. McPherson: We will so indicate.

The Court: You have until July 1st, and it is simply to be a rebuttal, if any, to the affidavits filed in this proceeding during the last day and a half. You understand? It is to be confined to those matters. And the matter will stand submitted after the receipt of the government's affidavits if the government elects to file. [284]

* * * * *

Monday, December 5, 1955. 11:30 A.M.

The Court: All right, the 1253 case. There are on the calendar two matters, one is a motion to

strike portions of the answer of Pancho Barnes, E. S. McKendry and William Emmert Barnes, and a motion to set for trial.

Miss Barnes: Your Honor, in the first place, let me say that I have talked to Mr. Richard Lavine, of the U. S. Attorney's office who you probably remember has made affidavits in this case, and so forth, and Mr. Lavine told me how wrong my particular answers were, that I had no right putting in an answer but my own, and I have here now an amended answer, and I want to withdraw my other answer and put this one in, which is in line with what Mr. Lavine spoke about at that time.

Now, since then, your Honor, I have received a communication from Mr. McPherson, in setting this hearing here, and where he is trying to cut out certain parts of my answer which I feel are very much a part of my case, and I wouldn't want to see them out for the reason they are very much a part of my case. I wouldn't want to see them deleted for they are the case, and I feel that just as the government is bound by its complaint, that I have a right to keep my answer consistent with the motions that we have had, the hearings that we have had, and the hearings we may [2] have in the future, and I don't want to delete that which I think is my right, in my answer.

The Court: Have you submitted to Mr. McPherson your proposed new answer?

Miss Barnes: I brought them with me this morning and Mr. McPherson has only had them just this

morning. I don't know whether he has finished reading or not, they are——

Mr. McPherson: You say "them", there is only one.

Miss Barnes: Well, a copy. You have the one, the copy and I have the other.

The Court: Is this proposed new answer on behalf of the three defendants?

Miss Barnes: Yes, and I am withdrawing my personal answer—I put in a personal answer—because I believe Mr. Lavine told me correctly, my interest was with them even though it was only a lease interest, but the interest of the land would have to be decided as a whole, so I withdraw my answer, my personal answer and I also answered with myself and the other co-defendants in another answer which I have amended to include myself and get rid of the surplus answers, and also I have deleted some of the things that the government has wished me to delete, but the main issues, however, I have left in. The government would like to get rid of them too, but I don't think they have a right to.

The Court: Well, let me say this, Miss Barnes, in the [3] first instance, compensation is determined with respect to the property taken as a whole, and then if the parties who own the interest as a whole are not able to agree as to the allocation or division of the compensation, then the law provides that a further hearing to determine how the total award should be allocated among the claimants be had. Is that correct?

Mr. McPherson: It is my understanding of the law.

The Court: Yes.

Mr. McPherson: Before this amended joint answer is filed I should like to be heard on the matter of allowing her to file it, because it almost entirely consists of the same defenses against which the motion to the former answer was directed. It is now a joint answer rather than a single one.

Miss Barnes: There are some substantial changes. I can reiterate those changes.

Mr. McPherson: Will your Honor hear me on her application for leave to file it, or will you permit my objection to stand to the filing of it?

The Court: Well, I was wondering if we might do this: Suppose that we continue the hearing on these matters until 1:30, and that will enable counsel to examine the pleadings and—is there an extra copy that the Court might see?

Miss Barnes: I have the Court's copy here.

The Court: Just hand it to me.

Miss Barnes: The original and the other one. [4]

The Court: Just hand them to me and I will examine them during the recess.

Miss Barnes: I think the crux of the situation, your Honor, is that Mr. McPherson is attempting to take your decision and opinion of the hearings that we had and on the strength of your opinions, your Honor, to delete from my answer some of the issues that were made by you at the time. Now this has not ever come to trial yet and I think I would

be losing some of my constitutional rights if they could not remain in my answer. I don't know exactly all of the ramifications that might mean, but I do know that either now or at some later time I do have a right to appeal to the Court of Appeals regarding the decisions that your Honor has made which, of course, I do not agree with. No hard feelings or anything, but I don't agree with your Honor's decision, and I do not want have granted any motions of the government to delete any of the things that I consider very definitely part of the case, because I want my right to continue my fight on those, and there may be new evidence that will come up if this goes to trial—if there is a trial—and I would like very much to take these things up previous to a condemnation trial, which as I understand it, is merely to decide the value of the property, whereas my case is still standing in my mind not as affecting the value of the property but as to the legality of the taking. [5]

The Court: We will continue the hearing on these matters until 1:30 this afternoon.

(Thereupon, at 11:45 a.m., a recess was taken until 1:30 p.m. of the same day.) [6]

Monday, December 5, 1955, 1:30 p.m.

Mr. McPherson: May it please your Honor, during the recess I took the opportunity to examine the proffered amended answer and I note that beginning with the third page, no, I am sorry, the second page, where the first numbered defenses are set forth, beginning at line 20, and throughout the re-

mainder of the answer, down to the prayer, the defendant proposes and tenders seven defenses, separately. Now, under Rule 15 of the Federal Rules of Civil Procedure, we think that the application should be considered as one for leave to file this answer rather than an amendment as a matter of right. The Court will recall that on several occasions we have had this matter before the Court on special defenses in the form of motions to defeat the Government's right to take and condemn and in those motions a large variety of items or reasons were assigned, both specifically and generally. In addition there were a number of collateral suits filed in this Court in which some of the various issues between these defendant owners and Government officials, including the operating personnel of the Base, Edwards Air Force Base, were made the subject matter of litigation.

After the matter was brought on before your Honor, you granted a motion made by this office, my office, designed to make specific and certain the grounds of resistance to the [7] right of the Government to condemn the property, and thereafter and after the defendant had at least been more specific than was true in the first motion, a protracted hearing was again held on those several grounds and finally, after consideration of the matters heard before you, before this Court, and matters that the records showed had been tendered to your predecessor on the bench, Judge Beaumont, and the records in the several cases tried, I believe, before Judge Carter, this Court made a rather comprehensive

order, which I take it may be considered the law of this case, and that the matters disposed of by that order are not now and cannot properly now be brought again before this Court for consideration.

Therefore, the filing of this amended answer, as I see it, should be governed by Rule 15, since I take it by the tender of the amended answer, and Mrs. Barnes' statement in open court that she had withdrawn the separate answer which she filed, that the motion addressed to the original answers filed on November 14 has been confessed. If I am wrong in that assumption it would not make much difference anyway, because the motion made to strike the original answers would stand over to this. Rule 15 provides as follows:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial [8] calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

That was Section (a) of Rule 15. Sections (b)

and (c) and (d) are not considered to be applicable. There are a number of cases under that Rule, some of which I picked up during the Court's noon recess, which may be of assistance in disposing of this matter. The case of *Momand vs. Paramount Pictures Distributing Company*, 6 Federal Rules Decisions 222, that case is of importance only in that it applies to the irregular manner in which this answer was tendered, since no motion for leave to file it was offered the Court, and the Court there held that such an amendment so filed without leave was—could be disregarded with no answer at all.

Miss Barnes: If your Honor please, I am not quite following Mr. McPherson. Just so that I am straight, if you don't mind, the Honorable Court in his decision and opinion on the motions that were before him, at the end of that said I had a certain date in which to file an answer, within the [9] 30 days, and the answer was filed within that time. Now the Government is taking exception to that answer. It happens, as I have already stated, that I talked to Mr. Lavine and he told me the several things that were wrong with it in the Government's opinion, so I came in with an amended answer that I thought should be satisfactory, excepting that I think that Mr. McPherson is trying to show a lot of other things that I don't think properly belong there. When he says the answer has not been filed yet, it was certainly offered as an amended answer to the Court and the copy was given to Mr. McPherson. What is he talking about now, the answer that was filed in compliance with the Court's re-

quest, was filed within 30 days or the answer that was brought in today, the amended answer?

The Court: He is talking about the proffered amended answer.

Miss Barnes: Well, he is referring to it as filed; I couldn't quite understand it. In other words, I don't think what he is reading applies.

The Court: I think in substance what he said is that under the facts of that case, even if it had been filed, it would have been disregarded.

Mr. McPherson: That is correct. Now in another case under this Rule, *Gaumont vs. Warner Brothers Pictures*, in 2 Federal Rules Decisions at page 45, the case simply held that although amendments to pleadings are freely given when [10] justice so requires, leave of the Court must first be obtained. And again in *Canister Co. vs. National Can Company*, 6 Federal Rules Decisions 613, the annotated note in 28 U.S.C.A. under Rule 15, at page 589, says:

"This rule does not permit a court to grant an amendment which seeks to add a defense which is obviously insufficient for the purpose for which it is offered."

We think this is particularly applicable to our case here. In a very recent case, *Fairbanks Morse Co. vs. Consolidated Fisheries* from the District Court of Delaware, in 94 Fed. Supp. which was reversed on other grounds in 190 Fed. 2d page 817, the rule was announced that an amendment to an answer which adds a new defense it not allowed when the defense itself would be insufficient. And

again in *Knitting Machines Corp. vs. Hayward Hosiery Company*, 95 Fed. Supp. 510, this rule was announced:

“Under this Rule”, meaning Rule 15, “amendments are granted with great liberality, but the Court should not grant an amendment to an answer which sought to add a defense which was obviously insufficient for the purpose for which it was offered.”

Miss Barnes: I don't know what this is all about, but I object to it on the ground that I am offering the amendment to the answer because the Government asked me to amend the answer and told me a great deal was wrong with my answer, and I have [11] tried to amend that answer in compliance with the Government's desire and what they want because I try to get along with the Government. As far as taking leave of any of my natural defenses that are a part of that case, I don't feel that I can do that. Therefore they are included in this amended answer. What I have tried to do is to please the Government on one hand, and on the other hand keep what I feel are my rights, my constitutional rights, in the case.

The Court: Well, Mrs. Barnes, as I see it, it isn't a question on your part of pleasing the Government. After all, the Government is certainly an adversary party. It has condemned your land, and you have the right, I have granted you the right to file an answer. Now you shouldn't file an answer to please the Government. You should file an answer to please yourself insofar as it is a proper legal

document responsive to the allegations in the complaint.

Miss Barnes: That is exactly with I mean, your Honor. I tried to file the document. We have no law library. We are working 130 miles off in the country and we are very, very busy and we can't get to town. So we filed the best answer we could. It was pointed out to me by Mr. Lavine that it was not a legal answer.

The Court: What you should do, of course, is to find out from the Court whether the document you want to file is a legal answer, rather than—— [12]

Miss Barnes: If the original document is a legal answer, in the mind of the Court, I would just as soon it stood, because I was not up here trying to amend the complaint. Mr. McPherson is making it sound as if I am trying to amend something. I am not trying to amend anything, I am willing to let the original stand, your Honor.

The Court: Well, you have proffered an amended answer.

Miss Barnes: I proffered it because——

The Court: Let's have Mr. McPherson complete his statement.

Mr. McPherson: I think that leave should be denied to the defendants to file this proffered amended answer insofar as it contains and sets forth the defenses numbered second, third, fourth, fifth, sixth and seventh, and prayer numbered four and two; the reason being that as the Court will observe from a very casual examination of them, each of these so-called separate defenses numbered

in series have all been asserted in the motions heard by this honorable Court, and disposed of by your order which is the law of the case, and they may not again be tendered as defenses in this suit so long as that order stands as the law of the case. I do not understand that any of the matters set forth in any of the special defenses so numbered tender any matter which has not been heard by and disposed of by this Court. Prayer number two is for the exclusion of the oil, petroleum, hydrocarbon and [13] minerals underlying the property, and prayer number four is for costs. Neither of those prayers are within the power of the Court to grant.

Miss Barnes: Your Honor——

The Court: First, Miss Barnes, let's review the situation.

Miss Barnes: I would just like to——

The Court: I would just like to clarify the situation. Now there was filed in this Court under date of November 14th an answer on behalf of the defendant Pancho Barnes, E. S. McKendry and William Emmert Barnes. The answer starts out "In answer to plaintiff's complaint, defendants Pancho Barnes, E. S. McKendry, and William Emmert Barnes admit, deny and allege as follows." Then you come down to paragraph three or four in your answer and you say in paragraph three, "The defendants deny generally and specifically all of the allegations contained in paragraph four of the complaint." Now do you have paragraph four, Mr. McPherson?

Mr. McPherson: No, I asked Mr. Eiland to bring it in.

The Clerk: Here it is, counsel.

The Court: Let's see, Mr. McPherson, exactly——

Mr. McPherson: What they are?

The Court: Yes, and first, you may follow, keep your copy of the answer that was filed November the 14th.

Miss Barnes: Your Honor, what's that about you can have as many defenses as you want? [14]

The Court: I have certain matters in mind. Now, have you got your copy of the answer?

Miss Barnes: Yes.

The Court: Now in paragraph one, you say the defendants, that means the three, deny generally and specifically all of the allegations contained in paragraph two. What is paragraph two?

Mr. McPherson: Paragraph two is the paragraph of the complaint in which the statutory authority for the acquisition is set forth and statutory references are given.

The Court: All right. Then in your paragraph two, of the answer of November the 14th, you say that the defendants deny generally and specifically all of the allegations contained in paragraph three.

Mr. McPherson: Paragraph three of the complaint alleges the public use for which the lands are taken as follows: "The lands are necessary adequately to provide for expanding needs of the Department of the Air Force and other military uses incident thereto."

The Court: All right. Now your paragraph three in that answer "The defendants deny generally and specifically all of the allegations contained in paragraph four."

Mr. McPherson: Paragraph four of the complaint alleges the estate taken for said public uses is the fee simple title subject to existing easements, public roads and highways, [15] railroads and pipelines.

The Court: All right. Then your paragraph four of the answer says: "The defendants deny that the land described in the condemnation complaint is owned by anyone except E. S. McKendry and William Emmert Barnes."

Miss Barnes: That is where I made a mistake, your Honor, and I will tell you why. I didn't realize a lessee is also an owner. Somebody explained to me that you can have leases for 99 years and that a lessee is also described as an owner. I really go on in the complaint and say I have an interest by way of a lease.

The Court: Now, in paragraph five of your answer of November 14th you say, "Pancho Barnes, aka Florence Lowe Barnes McKendry, does admit an interest in said lands by virtue of the fact that she is the holder of a lease thereon. The defendants E. S. McKendry and William Emmert Barnes deny that there are any owners of said lands except themselves answering paragraph eight."

Miss Barnes: I wrote it, your Honor, and I was quite wrong about the ownership. The amendment will correct it.

The Court: Well, let me——

Miss Barnes: I talked with Mr. Lavine about it in the office down there and those were the corrections that were made because that is what they want.

The Court: Now, going to the answer of November 14, [16] 1955, filed by Pancho Barnes.

Miss Barnes: That was the one that Mr. Lavine told me that the whole thing, as far as the value of the property went, had to be settled as to the value of the property, and then as you explained this morning, I believe, that if the property owners and lessees, and so forth couldn't get together it would take additional hearings to determine that. So I understand that. So I was removing that in favor of the new one that is supposed to comply with the other things. But I don't see why throw out my natural defenses.

The Court: I haven't indicated the throwing out of anything. I am trying to get down to what is before us. Now in this answer of Pancho Barnes filed on November 14th it is stated in the answer that she is the lessee of the subject property. Said lease was in effect since 1942, an additional lease was written in 1952 because of an additional owner, E. S. McKendry, and is now current and will be until 1976. Now it is my understanding that you want to withdraw the answer of November 14 filed on behalf of Pancho Barnes. You want to withdraw it.

Miss Barnes: I understand, your Honor, that it is superfluous, according to Mr. Lavine, and conse-

quently will be confusing, and he explained that to me and it makes sense to me. Therefore I think——

The Court: You have requested—— [17]

Miss Barnes: The request for withdrawing is only for substituting the amended complaint.

The Court: But you have asked that it be withdrawn, that is the answer on behalf of Pancho Barnes, and at the same time you have requested permission to file the amended answer.

Miss Barnes: In accordance with the government's request that I withdraw it. They wanted it.

The Court: I am not concerned about what the Government has requested you to do. The Government can't act as attorney for the Government or as officials of the Government and also as attorney for the landowners. You have either got to rely upon your own knowledge or you have got to get advice from some attorney of your own selection, who is not representing the Government.

Miss Barnes: I would like to withdraw the answer that I made substituting this answer that has been brought in as of today, the amended answer, but I would not want to withdraw the other one without the substituted answer being accepted.

The Court: I want to discuss with you a little bit the amended answer. Paragraph five of the proposed answer which you tendered this morning, says: "Answering the allegations of paragraph six", now is that the paragraph that sets up the legal description? [18]

Mr. McPherson: Paragraph six is the allegation in the complaint which sets forth the names of the

apparent and presumptive owners of the land set out after each tract number.

The Court: All right.

Mr. McPherson: It is not, however, as set forth in the answer, because as to Parcel L-2071 the record owner is Benjamin C. Hannam and Catherine May Hannam. I understand from Mrs. Barnes and her husband that they have some sort of a conveyance from those people who were the record owners and are the record owners at this time. However, it is not of record and the instrument cannot be found, and as to the other tract there are collateral interests of record which for the purpose of this answer need not be considered.

The Court: I want to call your attention to your proffered answer, in paragraph five. It says: "Answering the allegations of Paragraph six, defendants admit that the names of the owners of said lands are as follows:" Then Tract L-2040, you recite E. S. McKendry, Florence Lowe Barnes, then Tract 2043 you allege again William Emmert Barnes and Florence Lowe Barnes McKendry, then Tract L-2071 E. S. McKendry and Florence Lowe Barnes McKendry. Tract L-2072, E. S. McKendry, Florence Lowe Barnes McKendry. Now, what I want to find out, in the answer filed on November 14th the answer indicates that outside of having it leased from Mr. McKendry [19] and from the other Barnes, that you have no interest in the property; that you simply have a lease on it. That's what your answer of November 14th states; you simply have a lease from your husband and from your son. Now

the proffered answer is contrary to that and states that you are one of the owners, and your son's name doesn't appear at all, as an owner.

Miss Barnes: Yes, you read it there, your Honor.

The Court: He appears to be the owner of an interest in one tract.

Miss Barnes: Yes. He also in 1942 was the owner of another tract which was sold to Mr. McKendry in 1951. Now, here's the situation, your Honor. My husband and my son are the only record owners on the deeds recorded. I have a lease from them, but I have the rights and privileges of the property as far as the rentals and the buildings go, and according to what attorneys have told me that a lessee is also an owner, possibly not in the same extent as an owner as far as being able to deed the property, but they have an owner's rights in the property according to the lease, and that is what I went on in writing the second amended complaint, and is entirely on the basis I would have an ownership right by virtue of the lease. Otherwise, it is quite right, both statements are true as near as I can see. In other words, the first one was a pedantic true statement, true facts and the second one was taking into consideration the fact that a [20] person has a rather long term lease and has a business is in a sense an owner. That was explained to me by an attorney that I believe understands law pretty well.

The Court: Well, do I understand that your own interest in any of these tracts is that of a lessee?

Miss Barnes: Well, of course, I married Mr.

McKendry since the lease. In other words, I imagine I have acquired a certain interest possibly by marriage now that I didn't have at the time the leases were made.

The Court: Well, of course, ordinarily property acquired by a person prior to marriage, the general rule is that it remains his separate property. Now, that's the general rule.

Miss Barnes: Well, you just asked me, your Honor, and I answered. In other words, you asked me if that was the only interest I had.

The Court: Well, I want to state to you frankly, Mrs. Barnes, that it is the view of the Court that the special defenses which are set forth in the answer filed on November 14, 1955, by the three of you have no proper place in the answer. The Court on the motion to dismiss the complaint and on the motion to set aside the declaration of taking has ruled on all of those matters, and the Court will not permit those matters to stand in any answer that you file. The Court will, on motion, order them stricken. Now, I am talking about the [21] special defenses one to seven which appear in the answer filed on November 14, and also—well, I think there were more than——

Miss Barnes: They are very much the same, your Honor, the particular and special defenses are the same, I believe, in both answers.

The Court: Except that in the answer filed on November 14, there are eleven of them.

Miss Barnes: But factually they are the same.

The Court: The Court, if that is to be the an-

swer, would not permit those eleven defenses to remain in.

Miss Barnes: In other words, the Government makes a motion to throw them out and you will grant it, is that it?

The Court: I have already ruled once in passing upon the motion to dismiss.

Miss Barnes: Yes.

The Court: That those do not constitute legally any matters upon which the Court could dismiss the action. They are not defenses which will be heard at the time of the trial of this case.

Miss Barnes: Supposing, your Honor, I find something new that touches on those things. Would I be precluded from presenting it at the time of the trial?

The Court: I think that if it is merely evidentiary matter, relating to the same general subject, that the Court [22] would not consider those matters. In other words, the only matter that will be before the Court and the jury is just compensation at the time of the trial.

Miss Barnes: You feel that everything else as of this date is completely finished.

The Court: I say, from the standpoint of this Court, I think that my prior rulings are the law of the case and whatever form, whatever answer, the special defenses, whether eleven in number as set forth in your answer of November 14th, or seven in number as appear in the tendered answer, the Court would strike those matters from the answer.

Miss Barnes: All of them?

The Court: Yes, all of them. Now, I do think that it is important from your standpoint to provide in the answer who are the owners of the property in question, and that should be set forth in clear, unambiguous language in your answer. I think that a lessee of property has certainly a right to file an answer and set up his interest, the leasehold interest. Now, as I explained this morning when the hearing on just compensation comes on, it is the duty of the jury to determine just compensation for the entire interest, then if the claimants, the various people who claim an interest, are unable to agree among themselves how that award should be allocated, the law provides that after the value of the entire interest has been determined, a hearing can be had as [23] between the claimants on how the award might be allocated. So I want to say to you, I think you should set up in the answer your claims as to the holder of the leasehold. I think you should set forth who the owners of the property are. Now, the problem——

Miss Barnes: It is an interesting point there. We don't understand because we didn't understand what it was all about when the original appraisal was made by Mr. Evans. Mr. McKendry offered to show him the books and all about the leases and everything on the ranch, and he refused to look at any of them. He said he wasn't interested, that the Government wasn't interested in any books or anything of that kind, they were not buying a business, so he refused to consider that.

The Court: You will have, at the time of the

trial an opportunity to offer competent testimony on the fair market value of the property at the date of taking in whatever form that might take, as long as it is competent and relevant. The Court is not passing now upon the question as to whether or not your books and records and matters set forth in the lease might or might not be competent, and I want to also say this, Mrs. McKendry, to you, so you will be advised of the Court's views, if your interest, and I am speaking of you now, if your interest in the property is simply that of an owner of a leasehold, then the Court will have to restrict your representation to matters relating to that leasehold, and you will not be permitted, because you are not an [24] attorney, to represent owners of the fee. They will either have to represent themselves in proper persona, or they will have to secure the services of a lawyer licensed to practice or admitted to practice before this Court.

Miss Barnes: Well, the Government sued me and they originated the suit.

The Court: Up to this time, you have, in proper persona represented your husband and your son, and that has been under the belief of the Court that there was some joint interest of some character and in representing yourself you were also in effect representing the views of the other joint owners.

Miss Barnes: That was done, your Honor, because when this case first came on for hearing, at the first hearing, we were all doing the talking, my son, my husband and myself, and Judge Beaumont

selected me as spokesman and asked me to conduct the case.

The Court: I want to make it clear——

Miss Barnes: That is in the record——

The Court: I want to make it clear that I don't question for a moment that if Mr. McKendry, for instance, wants to represent himself at the trial, he will be permitted to do so. If your son wants to represent himself he will be permitted to do so. They will represent their respective interests. Now, in your case, you claim only—if you do [25] claim only a leasehold interest, you will be permitted in proper persona, to represent yourself, but only as to that interest. You will not be permitted as an attorney, because you are not an attorney, to represent the interests of your son and your husband. Do I make myself clear? I just want to advise you, because the Court intends to set this case for trial. It has been pending a long time.

Miss Barnes: It has not been pending, your Honor, nearly as long at 1201 has been, which is coming up on the 14th, or a great many others——

The Court: I am trying my best. I disposed of one in November, took a whole month, that was filed over four years ago and I have on the calendar for the 14th one that has been on the calendar, and I am going to put your case down for trial because I think in fairness to the landowners and people having interests in the property, and in fairness to the Government these cases should be disposed of as rapidly as all of the circumstances and exigencies surrounding them make possible, and as I say, the

Court is going to set the case for trial. I am just trying to outline to you what the procedure will be, so that you will have ample time to consider it.

Miss Barnes: Your Honor, as long as we are outlining these things, I would like to ask you a question. Should my husband and my son have an attorney representing them and their part, and I should be representing myself separately, those [26] cases would run concurrently, wouldn't they?

The Court: Oh, yes, certainly, it will be one case.

Miss Barnes: Don't you think that will be rather confusing?

The Court: We have many cases in which several attorneys are representing different claimants to the property.

Mr. McPherson: Fearful though I am of further confusing the issue, I think it is only fair since Miss Barnes is not an attorney, to state what our position will be on her right to participate in the proof of value. As we understand the law to be, the holder of a leasehold may not tender to the jury a separate valuation of the leasehold. They may be heard only on the value of the entire estate. In other words you can't value separately the leasehold and the real property and then aggregate the two. The only question before the jury is the value of the whole. The right of distribution is a separate inquiry, and will be heard separately. The lessee's interest is collateral.

Miss Barnes: I am interested in this. Naturally, when we look up things in a public law, such as Public Law 564 of the 81st Congress and the lan-

guage is so ambiguous in the Congressional Record, —in this case it said land for base expansion, and then went on and detailed other things in the \$26,000,000 was for developing field systems, and the land for base expansion, so we go back in the Congressional Record [27] and we find out just exactly what law Congress was passing and what they meant by it and what it was for and sort of to tie down this very wide open phrase “for base expansion” which could have meant anything, so we go back to rely upon the language of Congress to understand what they meant when they passed that law. Now, on this subject Mr. McPherson has just mentioned regarding the value of the land, and of the value of the lease, in that extent when Congress asked them what they were going to do with the money and what land they were going to get, they said—your Honor has it, I have no additional copies and your Honor asked me to put that in as an Exhibit, as a part of the record. It said we are buying the land and the operations on the land. That’s a quotation. I am sure that is correct although I haven’t looked at it for a month. It seems that to Congress there, the Air Force in explaining to Congress what they were going to do with that money under that law, broke it into there: they were going to buy the land and they were going to buy the operations on the land. Now Mr. McPherson has gone to the extent of saying that there is no difference between the land and the operations on the land, or, in my case, the lease, and yet in Public Law 564 they request specifically to Congress in

saying exactly what they are going to do under that law under which the property is taken.

The Court: I think what Mr. McPherson said to you was [28] this, and that is when it comes to the trial to determine just compensation a witness, an expert and it applies in the case of an owner himself, he can't testify that the soil is worth so much, and the buildings are worth so much and that the trees are worth so much and——

Mr. McPherson: Or the business on the property.

The Court: ——or the business on the property. In other words he must give his opinion as to the value of the whole property and the law is well established on that point and Mr. McPherson is simply giving you some timely advice or warning that when you come up to the trial you won't be permitted as the owner of the lease to get up and express an opinion as to the value of that lease at the time of the taking.

Miss Barnes: Well, I can have appraisers there, can't I?

The Court: Yes, but they will not be permitted to give their opinion as to the lease, the value of the lease. They will simply be permitted to give their opinion as to the value of the whole, what is taken.

Mr. McPherson: That, in our opinion, did not include the business.

Miss Barnes: In other words, that is in direct opposition to what Congress passed a law in which the words of the Congress that they were to buy the land and the operations. Of course, the Govern-

ment's opinion and Congress' opinion varies again.

The Court: Well, now coming back to the specific matter before us, if, Mrs. Barnes, you want to file the amended answer the Court will permit you to file it but the Court will order stricken from the amended answer all matters contained in that document commencing on line 20, page 2, commencing with the words "First Defense" and will strike down through line 21 which is part of the seventh defense which reads: "for any other military or public purpose or use" and the Court will strike paragraph two of the prayer which requests the hydrocarbon substances be excepted——

Miss Barnes: Just a minute.

The Court: ——and will strike four.

Miss Barnes: Are you going to strike about the minerals?

The Court: Yes.

Miss Barnes: Why?

The Court: Well, because it is a matter over which this Court has no power. The Government has elected to take the fee simple and this Court can't question the extent of the interest the Government seeks to condemn in the property. So what I wanted to say is that if you want to file this amended answer, the Court will permit it to be filed but the Court will order stricken the matters that I have detailed.

Miss Barnes: How much time have I got to make up my mind whether I wish to file or whether I wish to look it over in this case, and—— [30]

The Court: Will, I want to say this so you will

be completely advised, that if you don't care to file it, the Court will grant the motion of the Government in which it seeks to strike various portions of the complaint—the answer, filed on November 14, I believe.

Mr. McPherson: That is correct.

The Court: And also the motion to strike certain portions of the answer, the separate answer of Pancho Barnes. Now, I have indicated and if you want to withdraw the answer filed on behalf of yourself, the Court will permit you to do that, but the Court is not insisting right now that you make up your mind whether you want to do that.

Mr. McPherson: We have a motion pending to do that.

The Court: I know that.

Mr. McPherson: In your analysis, did you include that portion of the prayer, number four, the claim for costs? I didn't hear you.

The Court: Yes.

Miss Barnes: I have got a question——

The Court: Let me ask you this, Mr. McPherson, when do you intend to be in Fresno again?

Mr. McPherson: Well, I will be here on the 23rd of January for that hearing you just set this morning, but we will have an attorney here on the 14th on that trial set before you, 1201 and 1202. [31]

The Court: Well, I don't know whether that would be sufficient time for Miss Barnes to determine what she would like to do.

Mr. McPherson: That will be ten days.

Miss Barnes: I could not be here on the fourteenth. I have a prior——

The Court: Let me ask you this, can you be here on the 23rd of January?

Miss Barnes: I would try to be here on the 14th but I have to be a witness in a criminal case that day. Anyway, I plan to try to be up here on the 15th. I want to hear this trial, the Charley Anderson case.

Mr. McPherson: Why can't we dispose of it then?

Miss Barnes: Just a minute now. Are you granting a motion of the Government?

The Court: No, I have tried to explain to you what the Court feels it would have to do, but I am trying to give you the opportunity of being sure that you want to do exactly what you do.

Miss Barnes: What I want, what I am trying—since we are all being so above board—is to appeal this thing, get it up to the Court of Appeals. Consequently, if you grant the Government's motion, I believe that is an appealable thing.

The Court: I am not passing on the Government's motion.

Miss Barnes: What I am very anxious to do is to get this [32] motion granted so that I can presumably take this up, and not have this case in the place it was before, previous to appeal. But I think that now that you have quite definitely made the stand that you won't consider these things, and will consider nothing but the value of the property before the jury, I believe this is now appealable to

the Ninth Circuit Court of Appeals and consequently instead of dragging out these things and deciding when it will be convenient for me to make up my mind, my mind is made up on what I want. I want is to get our entire case up to the Circuit Court on any legitimate hearing that I possibly can.

The Court: But you want to see that you are properly advised. Now it may be, I am not sure, but it may be that these matters are reviewable only on an appeal from the final judgment.

Miss Barnes: There is a great deal of controversy on that. I believe a Circuit in the East somewhere allows them to come up. In Judge Fee's opinion he said it was appealable later or now, and he also said it was premature, that particular appeal was premature on that one point. But as I explained to the Court, I didn't want to be out of Court on it, and I have to make the appeal on it. Now, I am really anxious to go up to the Ninth Circuit on an appeal and I am very anxious to do that before the jury trial comes off because I feel that there won't be a jury trial. I believe the Ninth Circuit is [33] going to uphold the case. I don't feel that we will lose in the Appeals Court, and so I am very, very anxious now to be able to make that appeal and that is the only thing I want to do, so I don't like to set the date for the 14th——

The Court: In other words, you don't want any more time to decide what you want, you want to withdraw the answer you filed or have you decided you want to file the amended answer? You don't want any more time.

Miss Barnes: No, it isn't a question of that, your Honor. The question is this: what I want is an appealable action.

The Court: Well, the Court can only——

Mr. McPherson: May I accommodate her, your Honor? I will move that the Court rule on my motion to strike the portions designated in the motion, of the answer filed on November 14, and deny the defendants' proffer of the amended answer lodged with the Court today. That is to say, that portion commencing with the first defense, line 20 on page 2. Then she will have an order certain, whether it is appealable or not. I don't know.

Miss Barnes: Just a moment. We want to be able to file one appeal, and we figure that possibly if it was on the one on the 14th, there might be two. I want an order so we can make an appeal, because my appeal is going back to your opinion of the 17th. You see, what I want to do is to throw them out on the whole thing so I can appeal on the whole thing.

The Court: Then, what you want me to do is to rule on [34] the motions that were on the calendar, and you want to withdraw your amended answer. Is that right?

Miss Barnes: I am not sure. I don't believe so.

The Court: Well, I am trying to find out.

Miss Barnes: What I would like to do is to proffer my amended answer and ask Mr. McPherson—he said the motion follows my amended answer, in other words, his motion was to both answers. In

other words, let's lump the whole thing in together, then we are sure of it.

Mr. McPherson: No, you misunderstood me.

Miss Barnes: Let me say this. These defenses that the Government has asked to throw out of the answer, and which your Honor has said he was going to throw out of the answer, and which your Honor has ordered me to take out of the answer——

The Court: No, I haven't ordered it. I have just indicated to you that the Court intended to strike them.

Miss Barnes: That the Court did intend to strike them? Is that it?

The Court: Yes.

Miss Barnes: Well, if the Court intends to strike them, that, in substance, is the case, isn't it, your Honor?

The Court: Well,——

Miss Barnes: In other words, the striking then would be the same, no matter whether they were in the complaint filed November 14th or in the second answer as proffered today. It [35] would be the same situation.

The Court: What the Court will do, the Court will grant the motion of the Government to strike portions of the answer of defendant Pancho Barnes, in accordance with the motion filed at the hearing on November 13, and will grant the motion of the Government to strike portions of the answer of the defendant Pancho Barnes, E. S. McKendry and William Emmert Barnes, as set forth in the same motion. The Court will permit the filing of the

amended answer tendered today, but will strike, order stricken, all of the matters set forth in the first through the seventh defense, inclusive, including paragraph two and four of the prayer.

Mr. McPherson: I think only that portion of paragraph four of the prayer that has to do with the costs, is to be stricken.

The Court: Yes, that is right. And I will direct that the Government prepare the form of order, and serve a copy on the defendants.

Mr. McPherson: Then will the Court set the case for trial?

The Court: Then the Court will set the case for trial on—commencing on June 5, 1956 before a jury, and I will direct the Government to give notice.

Mr. McPherson: Yes, your Honor.

Miss Barnes: June 5. How long do you think it will [36] take, your Honor? You have one set for the 19th of June.

The Court: Well, I don't know how long it is going to take. I set aside approximately two weeks, and the only issue that will be before the jury at that time is just compensation. Now, if it takes longer than two weeks, we will have to take the additional time.

Miss Barnes: And with what we have done today, then, you have barred any further discussion before this Court at any time on anything excepting the just compensation. Is that correct?

Mr. McPherson: I submit that is not the case.

Miss Barnes: That is what his Honor said.

The Court: The question as to all of the matters that are put in issue by the complaint and answer will be considered at the trial, and the Court has already indicated to you its views concerning representation in proper persona and representation through counsel.

Miss Barnes: So whether we like it or not, we are going to have some legal help.

The Court: No, I don't say that at all. My point is that each defendant will be permitted to represent himself but no unlicensed person may, under the law, represent as an attorney some other litigant.

Miss Barnes: I don't know anything about law, your Honor, I have a sort of horse instinct for some of it, but [37] I have got an interest in that property, no matter whether it is by lease or by fee simple title or whatever it is, but my interest would be the same as it would be from the start, because you can't quibble just exactly how it comes in. If I want to represent myself and if they want me to represent them, I should think it would be six of one and a half dozen of the other as to what the interest was as long as that interest cannot be considered separately. Mr. McPherson says it can't be considered separately, so I don't know exactly——

The Court: Well, let me say this, Mrs. Barnes, you will be permitted to represent yourself, if you are so advised. Mr. McKendry will be permitted to represent himself and your son, the same thing, but you will not be permitted to appear in effect as an attorney representing the other defendants.

Miss Barnes: I understand that, excepting that if we are all in one case, and must be here together, then just as Judge Beaumont said, they chose me as spokesman.

The Court: I have tried to make clear the situation. Now, I think that's all.

Mr. McPherson: We have one other case.

The Court: I meant in connection with the Barnes matter.

Mr. McPherson: Yes, your Honor. [38]

[Endorsed]: Filed July 11, 1955.

[Endorsed]: No. 15580. United States Court of Appeals for the Ninth Circuit. E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes and William Emmert Barnes, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: June 12, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15580

E. S. McKENDRY and PANCHO BARNES,
Appellants,
vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS ON APPEAL, AND
DESIGNATION OF RECORD

The appellants hereby adopt the Statement of Points on Appeal and Designation of Record heretofore filed in the United States District Court, Southern District of California, Northern Division, in the above-entitled proceeding, and heretofore designated as a part of the record on appeal in the within proceeding.

Dated: June 19, 1957.

BEARDSLEY, HUFSTEDLER
& KEMBLE,

/s/ By SETH M. HUFSTEDLER,
Attorneys for Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 20, 1957. Paul P.
O'Brien, Clerk.

No. 15580

**In the United States Court of Appeals
for the Ninth Circuit**

**E. S. MCKENDRY, FLORENCE LOWE BARNES, ALSO
KNOWN AS PANCHO BARNES AND WILLIAM EMMERT
BARNES, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION**

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,

LAUGHLIN E. WATERS,
*United States Attorney,
Los Angeles, California,*

JOSEPH F. McPHERSON,
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PAUL E. GIBBEN, CLERK

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(I)

In the United States Court of Appeals for the Ninth Circuit

No. 15580

E. S. MCKENDRY, FLORENCE LOWE BARNES, ALSO
KNOWN AS PANCHO BARNES AND WILLIAM EMMERT
BARNES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINIONS BELOW

A memorandum opinion of Judge Beaumont in March 1954 denying a motion to dismiss and setting a date for delivery of possession (R. 29-34) is not reported. Opinions of this Court dismissing attempted appeals from orders issued pursuant to the March memorandum (R. 49-54) are reported at 219 F. 2d 357. An order denying motions to dismiss and to set aside the Declaration of Taking of Judge Jertberg in October 1955 (R. 159-170) is not reported.

JURISDICTION

The jurisdiction of the district court of this condemnation proceeding brought by the United States was invoked under the provision of the Act of August

1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258 (a) and other statutes cited in the complaint (R. 4). Final judgment was docketed and entered November 13, 1956 (R. 196). A timely motion for new trial was denied by order entered December 17, 1956 (R. 200-201) and notice of appeal was filed February 11, 1957 (R. 201-203). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

STATUTE INVOLVED

The relevant portion of section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258(a) is set out in the Appendix, *infra*, p. 16.

QUESTIONS PRESENTED

1. Whether the change of the caption of a Declaration of Taking to conform to its filing in a separate condemnation proceeding rather than by amendment of a pending proceeding is a material alteration rendering the declaration a nullity, and, if so,

2. Whether the trial court's ruling holding the declaration valid prejudiced the condemnees when there is no indication that their compensation might otherwise have been more.

STATEMENT

While many other questions were raised in the course of the proceedings of this case and five issues were raised in the statement of points to be relied upon an appeal filed in the trial court (R. 203-205);

the specifications of error in appellant's brief (p. 5) present only the narrow question relating to alleged alteration of the Declaration of Taking. Most of the material in the record can consequently be ignored and the facts essential to decision of the single issue may be summarized as follows:

In 1952 the Department of the Air Force was undertaking expansion of the Edwards Air Force Base in Kern County, California. Appellants land consisting of some 360 acres was required for that purpose. Purchase negotiations having failed, the institution of condemnation proceedings became necessary. There was then pending a case to acquire lands for the Edward Air Force Base entitled *United States v. 1710.73 Acres of Land, Etc.*, numbered Civil 1201-N. D. By letter of February 3, 1953, the Assistant Secretary of the Air Force transmitted to the Attorney General a Declaration of Taking executed the same day covering appellant's lands. The Declaration had been drafted on the assumption that it would be filed in case Civil 1201-N. D. and hence had the caption of that case and was designated Declaration of Taking No. 2. The Assistant Secretary's letter requested that the necessary action be taken to amend the proceedings. The appropriate instructions and the Declaration of Taking were transmitted to the United States Attorney. A few days later that official requested authority to file a separate proceeding rather than amend the pending case for several stated reasons (R. 113-115).

The requested authority was given by telegram dated February 25, 1953, and on February 27, 1953, the complaint in this case, No. 1253 N. D. — Civil was filed (R. 3-7). At the direction of August Weymann, the attorney in charge of the case, the Declaration of Taking was conformed to the procedural change by correcting the title of the cause, the civil number and the title Declaration of Taking No. 2 (R. 168-169, 553-554). The printed record does not show the changes since, as is customary, the title of the district court and the cause was printed only once (R. 7, 80). One change was made in the text of the declaration which was to strike the word "amended" referring to the complaint in paragraph 2 (See R. 9, line 9, R. 80).

On March 2, 1953, an *ex parte* decree was entered on the Declaration of Taking (R.13-17). Fifteen days later, the Attorney General transmitted to the Secretary of the Air Force a letter stating that valid title had vested in the United States and enclosing certified copies of the complaint and the decree on the Declaration of Taking (R. 128-129).

Title to the property was vested in E. S. McKendry, Florence Lowe Barnes McKendry, also known as Pancho Barnes, and William Emmert Barnes (R. 184-185). Extremely vigorous objection was made to the taking by the defendants appearing in *propria persona*. In August 1953 the United States moved for an order for delivery of possession. This was contested by defendants who moved to dismiss and to set aside the decree on the Declaration of Taking (R.

17-20, 187). The proceeding was alleged to be brought in bad faith and in violation of statute and it was also claimed that the estimate of just compensation was made in bad faith (R. 19-21). Extensive hearings at which evidence, primarily oral testimony, was presented were had in September 1953, October 1953 and February 1954 (R. 187-188, 218-459). Judge Beaumont, in March 1954 denied the defendants' motions and ordered delivery of possession by May 22, 1954 (R. 29-34). After several extensions possession was finally delivered in August 1954 (R. 187). On January 31, 1955, this Court dismissed, for lack of finality, attempted appeals from denial of the motion to dismiss and the motion to set aside the Declaration of Taking and dismissed as moot an appeal from a temporary injunction issued in February 1954 restraining defendants from constructing buildings on the lands (R. 49-54).

Appellant's attack upon the taking was continued by the filing in April 1955 of a motion to dismiss (R. 54-56) and a motion to set aside the Declaration of Taking and supporting affidavit (R. 57-69). "Supplemental Specific Information" on these motions was filed May 12, 1955 (R. 70-81). This document referred to the changes in the Declaration of Taking and alleged that unnamed attorneys and others had described it as "manufactured", "forged" and "fraudulent" (R. 81). On June 1, 1955, the motion to dismiss was supplemented to allege invalidity because of the changes (R. 82-89).

The various grounds of attack upon the taking were heard by Judge Jertberg at hearings in June 1955. Of present importance is the submission of an affidavit of Richard Lavine, an Assistant United States Attorney, to which is attached photostatic copies of the documents in the United States Attorney's office relating to institution of the proceedings (R. 99-129). This affidavit was admitted after Pancho Barnes had cross-examined Assistant United States Attorney Joseph McPherson concerning the changes and he stated, "I have the whole file there and you are at liberty to inspect it for that purpose" (R. 554). There was also submitted the affidavit of August Weymann, who was in charge of the case at the time it was filed, narrating the substance of the matters shown by the files (R. 130-136). At the close of the hearing Pancho Barnes was given until July 1 to file an affidavit confined to rebuttal of those filed in the proceeding (R. 571). On July 5 her affidavit was filed which *inter alia*, attacked the exhibits attached to the Lavine affidavit because they were photostatic copies of documents in the United States Attorney's files (R. 146-159).

In October 1955, Judge Jertberg denied the motions. He dealt with the various objections to the taking under six grounds; the last being the charge that the Declaration of Taking was fraudulent, manufactured or forged (R. 161-162). After brief discussion he concluded (R. 168-169) that "the Declaration of Taking in question was and is a valid

document and is neither forged, manufactured nor fraudulent" (R. 169).

Compensation was determined by a jury, which, by verdict returned in June 1956 found the value as of February 27, 1953 to be \$337,500 (R. 183-185). In entering judgment the Court awarded appellants interest from February 27, 1953, upon the amounts by which the verdict exceeded deposits made (R. 192-193). It denied a claim of the United States for deduction of three items all of which resulted because of the delay in obtaining possession. These were (1) rent during the period possession was withheld (2) a deduction because two structures—a dance hall and defendant's residence—included in the valuation were destroyed by fire before possession was delivered and (3) a deduction for various items such as plumbing, air-conditioners, etc., included in the valuation but claimed to be missing when possession was delivered. Appropriate judgment was entered (R. 194-196) and, after a new trial was denied, this appeal followed (R. 201-202).

ARGUMENT

I.

The declaration of taking was valid

A. The declaration of taking conformed in every respect to the requirements of the statute: The Declaration of Taking Act requires that the declaration shall contain or have annexed thereto five specified items and shall be signed by the authority empowered by law to acquire the lands. (See *infra*, p. 16.) The declaration in the present case was so signed and conformed to every requirement of the statute. (See

R. 7-12). Only one word was changed in the text of the declaration, which was the deletion of the word "amended" from paragraph 2 (R. 9). The declaration as executed and as filed was in strict accordance with every requirement of the statute and was, therefore, valid.

B. The changes in the heading of the declaration of taking were not material alterations rendering the declaration void: The declaration in this case was changed to reflect the decision to file a separate case covering these lands rather than amending an existing proceeding to include them. The legal effect of the declaration was the same whichever procedure was employed. As appellant's own citations show, to be material an alteration of an instrument "is one that works some change in the rights, interests, or obligations of the parties to the writing" (Br. 17, 20-21). As the Court put it in *Cities Service Oil Co. v. Viering*, 404 Ill. 538, 89 N. E. 2d 392 (1949): "But it is clear that the alteration of a written instrument, by the elimination of words which had no effect at the time the contract was signed and delivered, could not be an alteration changing the legal effect of the instrument."

The caption of the Declaration of Taking was not required by statute and was used mainly for the purpose of identification of the case where it could be found. The caption could have been removed by scissors without changing to the slightest degree the nature of the instrument. Change to reflect the correct case title and docket number was not, we submit, a material alteration.

In this connection, regard must be had to the division of authority between the Attorney General and the officials of agencies seeking to acquire land. It is the officials of those acquiring agencies who determine whether condemnation of particular land is necessary or desirable. Likewise, it is for those acquiring agency officials to determine whether a Declaration of Taking should be filed at the time of institution of the proceedings or at some later date. But once the request to institute proceedings or the Declaration of Taking has been transmitted to the Department of Justice, jurisdiction to determine all matters in connection with the case is vested in the Attorney General. See *Clark v. United States*, 155 F. 2d 157 (C. A. 8, 1946). As the court below put it, "The Secretary of the Air Force determined that the land would be condemned. The Attorney General determined the manner of its acquisition. [citations]" (R. 169, see also R. 560-561). Thus, it was the function of the Attorney General to determine whether it was more desirable to acquire this land in separate proceedings or by amending pending proceedings. The change in the caption simply reflected the Attorney General's decision that a separate suit would be filed and did not vary any term or condition which the Secretary of the Air Force had authority to specify. It could not, therefore, render the Declaration of Taking void.

Moreover, to the extent that the Secretary of the Air Force could have any voice in the question whether another case should be brought, he concurred

in and ratified the Attorney General's determination. A copy of the complaint and the decree on the Declaration of Taking reflecting the fact of institution of a separate suit and giving its title and docket number was sent to him a few days after the case was filed (R. 128-129). Subordinate officers of the Department of the Army which handled such matters in behalf of the Air Force were fully advised of the changes and were furnished a corrected first page of the Declaration of Taking (R. 118-120, 123-126). No objection was made to the change in procedure. Instead in July 1956, an additional deposit was made (R. 192). Plainly, any defects in the procedure have been ratified by the acquiring official.

That no material alteration has been made is apparent from the fact that no substantial right of appellants was affected by the change. Whether the land was condemned in one proceeding or another made no difference to appellants. They argue that the date of taking was accelerated by 4 days (Br. 17-20). But there is nothing to indicate any change in value or any reason why a 4-day difference produced any prejudice to appellants. And appellants' computations are faulty because they assume that had the original plan of including these lands in the pending proceeding been followed, no steps would have been taken until the check was received on February 20, 1953 (Br. 19). But it is clear that it was the necessity of obtaining approval from Washington of the change of procedure that delayed proceedings during February and that, except for the

change, the case would probably have been filed earlier. While of no present importance, we disagree with appellant's assertion that a supplemental complaint rather than simply amendment of the complaint would have to be filed and that the court would have discretion whether to allow it. The mistake is, we think, in the narrow meaning appellants give "amendment" in Rule 71A(f). Ordinary civil litigation deals with rights which have accrued from past transactions such as breaches of contracts or commission of torts and amendments or supplements may prejudice defendants because of limitations on time or damages recoverable and the like. But condemnation deals with the present, is the transaction itself, and amendment to add new parties, to correct land description or to add new tracts for the same project cannot prejudice the defendants. Consequently Rule 71A(f) liberalizes amendment rules to dispense with the necessity of court approval since the reason for requiring court approval in ordinary cases does not apply. The same reason applies, we submit, whether the amendment adds a new party or a new tract of land and, hence, the same rule as to amendment applies.

C. The objection to consideration of documents from the files of the United States Attorney's office lacks merit: Appellants complain that the exhibits attached to the affidavit of Assistant United States Attorney Lavine are photostatic copies of documents in the file of the United States Attorney's office. There are three short answers to this argument. First, the

affidavit of Mr. Lavine plainly constitutes proper authentication within the meaning of 28 U.S.C. 1733(b) where he states under oath that the photostats are true copies of the original documents in the United States Attorney's file (R. 99). Appellants' argument would require the introduction in evidence of the original documents which is the very thing the statute was intended to avoid. The case of *Yung Jin Teung v. Dulles*, 229 F. 2d 244 (C. A. 2, 1956), the sole authority cited by appellants (Br. 28-29) is plainly irrelevant for the primary reason that there the Assistant United States Attorney's affidavit concerned, not documents in the United States Attorney's file, but photostatic copies of a report in the files of the Department of State. Moreover that report, the court held, could not itself be admissible because the person who signed it was not shown to have personal knowledge of the facts to which it related. Here, there cannot be any objection to admission of the original documents, for example, the original telegram from the Assistant Attorney General authorizing the procedure of filing a separate case.

A second answer to appellants' argument is the fact that the United States Attorney's file was produced in court and as Mr. McPherson stated to Pancho Barnes (R. 554) "you are at liberty to inspect it for that purpose". Pancho Barnes did not then object to the use of copies rather than originals nor make any claim that the copies were, in any respect, erroneous or incomplete. Instead she quoted from the documents in cross-examining Mr. McPherson (e. g.,

R. 556). We submit that the objection made later in her rebuttal affidavit came too late. The court did not, as appellant states (Br. 26) prohibit appellant from objecting to matters contained in the affidavit. Mrs. Barnes, who was conducting the case without benefit of counsel had indicated an idea that she had a choice whether or not the affidavits would be filed and the court pointed out that motions of this type are ordinarily heard upon affidavits (R. 570). The record shows that the trial judges have been more than patient in this case and did not foreclose Mrs. Barnes from urging any position or objection.

A third answer to appellant's objection is that the case does not turn upon the documents attached to Mr. Lavine's affidavit. The facts shown by the documents likewise appear from the affidavits of Assistant United States Attorney Weymann (R. 130-136) and the oral testimony of Assistant United States Attorney McPherson (R. 542-562). The case is the same if the copies of the documents are ignored.

II

Even if the changes in the declaration of taking rendered it void no prejudice to appellants justifying reversal of the judgment is shown

Since appellants have now abandoned their claim that the right to condemn their property is lacking, the only question remaining is the right to compensation. But no issue has been raised as to the amount of the judgment either with regard to the jury verdict or with regard to interest. It follows, we submit, that whether the Declaration of Taking was valid or not is a moot question.

A conclusion that the Declaration of Taking was a nullity might change the date of taking, since absent the filing of a declaration, the taking is the date possession was acquired, *United States v. Vilbig*, 208 F. 2d 663 (C. A. 5, 1953); *Anderson v. United States*, 179 F. 2d 281 (C. A. 5, 1950) cert. den. 339 U. S. 965; *United States v. Comparet*, 164 F. 2d 452 (C. A. 10, 1947); *23 Tracts of Land v. United States*, 177 F. 2d 967 (C. A. 6, 1949); See also *United States v. Mahwold*, 209 F. 2d 751 (C. A. 8, 1954). Possession was finally delivered in August 1954 (R. 187). There is nothing to indicate that the property increased in value substantially between February 1953 and August 1954. Rather than prejudicing appellants use of the earlier date of taking benefited them very substantially in four respects. First, interest was computed from the earlier date on \$172,500 which amounts to more than \$15,000 between February 1953 and August 1954. Secondly, appellants had the benefit of some \$194,000 deposited during that year and a half even though they continued to occupy the property and were not charged with rent for that period. In the third place, the verdict included compensation for the dance hall and residence which were destroyed before August 1954 (R. 188) and hence would be excluded if the date of possession were the date of taking. Finally, plumbing fixtures, doors, heaters, pumps and motors would be excluded if the later date of taking controlled (R. 188). Plainly, any error in refusing to set aside the Declaration of Taking and

the decree entered thereon¹ was harmless so far as appellants are concerned.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be affirmed.

Respectfully.

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
*United States Attorney,
Los Angeles, California.*

JOSEPH F. MCPHERSON,
ALBERT N. MINTON,
*Assistant United States Attorneys,
Los Angeles, California.*

ROGER P. MARQUIS,
*Attorney, Department of Justice,
Washington, D. C.*

JANUARY 1958.

¹ We, of course, recognize that the *ex parte* decree entered on the Declaration of Taking does not preclude condemnees from urging any objection they may have to the taking.

APPENDIX

The pertinent portion of Section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a, provides that:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

No. 15580

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. S. McKESTORY, FLORENCE LOWE BARNES, also known
as PANCHO BARNES, and WILLIAM EMMERT BARNES,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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FILED

NOV 16 1957

PAUL R. BARNES, Clerk

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No. 15580
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. S. McKENDRY, FLORENCE LOWE BARNES, also known
as PANCHO BARNES, and WILLIAM EMMERT BARNES,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

*To the Honorable, the Court of Appeals of the United
States for the Ninth Circuit:*

This is an appeal from that part of a judgment of the District Court, the Honorable Gilbert F. Jertberg presiding, in the above-entitled proceeding in eminent domain, in which said Court adjudged and decreed that the United States was entitled to condemn appellants' land, and from those orders of said Court which denied appellants' motions to set aside the Declaration of Taking and to vacate and set aside the *ex parte* judgment thereon.

Jurisdiction.

Jurisdiction of the District Court was invoked under Section 1358 of Title 28, U. S. C. A., giving jurisdiction to said Court in all proceedings to condemn real estate for the use of the United States. Final judgment in said action was docketed and entered November 13, 1956 [R. 196]. The judgment was amended to correct a mathematical error on December 14, 1956 [R. 200]. Appellants filed Notice of Appeal on February 11, 1957 [R. 202]. The jurisdiction of this Court rests upon Section 1291 of Title 28, U. S. C. A.

Statement of Facts.

The United States instituted condemnation proceedings against appellants'¹ property, approximately three hundred sixty acres of land in Kern County, California, on February 27, 1953, by filing its Complaint in Condemnation and by filing a purported Declaration of Taking² [R. 1-12]. On the same date, the United States deposited in the registry of the Court, the sum of \$205,000.00 representing the estimated just compensation for

¹Appellants are E. S. McKendry, also known as Eugene S. McKendry, his wife, Florence Lowe Barnes McKendry, also known as Pancho Barnes, and William Emmert Barnes, the son of Pancho Barnes. The character of the interests and estates owned by each of the Appellants in the subject property is not in issue; together their interests represented fee simple title to the subject property. [R. 184-187.]

²The validity of the Declaration of Taking was challenged by Appellants in the trial court and is challenged upon this appeal. Evidence relating to the Declaration of Taking, its legal effect, and that of the decree entered thereon, are discussed in later sections of the Brief.

the property [R. 184]. An *ex parte* order on the Declaration of Taking was entered March 2, 1953, confirming title in the United States [R. 13-17].

The United States thereafter sought an order for immediate possession of the property [R. 319]; appellants countered with motions to dismiss, to set aside the Declaration of Taking and the judgment entered thereon [R. 17-29]. The Honorable Campbell Beaumont, late district judge, ordered the premises surrendered on May 22, 1954; a further order postponed surrender until July 24, 1954 [R. 50]. By stipulation and agreement of the parties the time for surrender or possession was extended to August 7, 1954 [R. 187]. The District Court denied appellants' motions on the ground that appellants' withdrawal of a part of the deposit foreclosed them from objecting to the taking [R. 29]. Appellants appealed these orders. This Court held that the withdrawal of the deposit did not foreclose appellants from challenging the validity of the taking, but the Court dismissed the appeal as premature upon motion of the Government.³

In April, 1955, appellants renewed their motions to dismiss the condemnation action and to set aside the Declaration of Taking and the *ex parte* judgment entered thereon [R. 54-60, 70-92]. The principal grounds for

³This Court's opinion is reprinted in the Record at pp. 49-50. The decision is reported *sub. nom. McKendry v. United States*, 219 F. 2d 357 (1955). A companion appeal was taken from the grant of a temporary injunction which this Court dismissed as moot [R. 53-54].

appellants' motions were that (a) the Declaration of Taking was materially altered after its execution without authority or consent, (b) the Declaration of Taking and the deposit were not made in compliance with the applicable statutes; and (c) the condemnation action was not instituted in compliance with the statute in that the acquiring agency's determination of necessity was not made in good faith, but was arbitrary [R. 54-60, 70-92]. The Honorable Gilbert H. Jertberg, District Judge, heard the matter upon affidavits filed by the parties and upon oral testimony and thereafter entered orders denying appellants' motions [R. 159-179].⁴ The Court, *sua sponte*, struck from appellants' Amended Answer all allegations therein which were directed to the validity of the taking [R. 179-181] on the ground that such matters had theretofore been determined and had become the law of the case [R. 589-590].

Commencing June 5, 1956, a jury trial was held in which the issue was confined to the fair market value of the subject property as of February 27, 1953, the date of the filing of the Declaration of Taking [R. 188]. The jury found the fair market value on that date was \$377,500.00 [R. 192]. No issue is raised on this appeal in respect of the jury trial on the compensation aspect of the proceedings.

⁴The trial court's opinion is reprinted at pp. 159 *et seq.* of the Record; the affidavits filed in the course of the hearing and the evidence is discussed in detail in later sections of this Brief.

The District Court tried certain collateral issues in connection with the condemnation proceedings in July and August, 1956, none of which is in issue on appeal [188-191].

Specifications of Error.

Appellants respectfully submit that the District Court erred in the following particulars:

1. The trial court erred in denying appellants' motion to set aside the Declaration of Taking and the *ex parte* judgment entered thereon in that

(a) The Declaration of Taking herein filed was void because it was materially altered after its execution without the knowledge or consent of the condemning authority; and

(b) The filing of said Declaration of Taking did not comply with the provisions of the Declaration of Taking Act, and, therefore there was no statutory authorization for said taking.

2. The trial court committed prejudicial error in receiving into evidence and considering upon the hearing of appellants' said motions, documents introduced by the Government which were inadmissible.

ARGUMENT.

I.

The Declaration of Taking Herein Filed Was Invalid and Ineffective to Transfer Title to the United States.

A. The Declaration of Taking Was Materially Altered After Its Execution Without the Knowledge or Consent of the Assistant Secretary of the Air Force, Who Executed the Instrument.

1. THE DECLARATION OF TAKING FILED WITH THE DISTRICT COURT WAS ALTERED AFTER ITS EXECUTION.

The original Declaration of Taking filed with the District Court⁵ shows alterations on the face of the instrument. The document reveals the language of the instrument as it was originally drafted as well as the alterations. The following changes are apparent:

(a) The name of the case was "*United States v. 1,710.3 Acres of Land*, in the County of Kern, State of California; *Ethel Petrovna Rice, et al.*" The description of the land taken and the name of the defendant were stricken out with typewritten "X's", The words "360 Acres of Land" and "*E.S. McKendry, et al.*" were substituted, by adding these names to the original designation.

(b) The document had been entitled "Declaration of Taking No. 2." This language was stricken in the same manner by crossing out the term "No. 2."

⁵The original document appears in the typewritten record on this appeal at pp. 6 *et seq.* The alterations were not reproduced and do not appear in the printed record. See pp. 7 *et seq.* of the printed record.

(c) The document had been numbered "1201-ND"; the number was stricken in the same manner and the number "1253-ND" was substituted.

(d) On the second page of the document, beginning at line 16, the words "and is a description of part of the lands in the amended complaint in condemnation filed in the above-entitled cause," appeared; the word "amended" was stricken.

The instrument signed by E. V. Huggins Assistant Secretary of the Air Force was executed February 3, 1953 in Washington, D. C. [R. 10].

The changes were made on the instrument by the direction of August Weymann, then an attorney in the Lands Division of the Department of Justice in Los Angeles on February 27, 1953 [R. 133, 533-34].

2. THE ALTERATIONS WERE MADE WITHOUT AUTHORITY AND WITHOUT THE KNOWLEDGE OR CONSENT OF THE ASSISTANT SECRETARY OF THE AIR FORCE.

Assuming for the purpose of this argument that the District Court properly received and considered the documents attached to the Affidavit of Richard A. Lavine, Assistant United States Attorney [R. 99-129], the documents themselves show that there was no authority to alter the Declaration of Taking. The documents attached to the Affidavit of Richard A. Lavine were asserted to constitute the complete file bearing upon the Declaration of Taking and the manner in which it was filed [R. 459-460].

The original document was prepared by William M. Curran, an attorney doing legal work for the Corps of Engineers [R. 461] for a case entitled *United States v. 1,710.73 Acres of Land*, in the County of Kern, State

of California, Ethel Petrovna Rice *et al.*, on *November 24, 1952* [R. 466]. He did not make the alterations which appear on the face of the instrument filed in this action [R. 465-466]; the alterations were made after the paper left the office of the Engineers [466].

On *December 1, 1952*, the District Engineer, Los Angeles, received a teletype from the South Pacific Division Engineer at San Francisco, which directed preparation of a declaration of taking for appellants' property if an option could not be obtained for it.⁶

Colonel W. R. Shuler, District Engineer, in the Los Angeles Office forwarded the original Declaration of Taking to the Division Engineer in San Francisco with a cover letter dated December 4, 1952, which stated, in part:⁷

"Inclosed is Declaration of Taking assembly covering these tracts, in which the declaration is indentified as Declaration of Taking No. 2 in Condemnation Case No. 1201-ND Civil. *The land described in the Declaration of Taking is not presently embraced by said condemnation action and will require amendment to include Tracts Nos. L-2040, L-2043, L-2071 and L-2072 therein.*" [Emphasis added.]

A copy of the Declaration of Taking assembly was sent by the Chief of the Acquisition Branch of the Real

⁶The entire contents of the teletype were: "Chief of Engineers ENGLP 2336 dated 28 Nov. 1952. Quote reference your letter 7 Nov. 52 concerning Pancho Barnes McKendry property, Edwards Air Force Base, California. If option cannot be obtained submit condemnation with declaration of taking." [R. 462-463].

⁷The entire letter is reproduced in the printed record at pages 103 *et seq.*

Estate Division to the United States Attorney's office in Los Angeles on December 8, 1952, according to a letter attached to one of the Government's affidavits: the letter, however, also bears alterations.⁸

There is no evidence in the Record, whether, or in what manner, the Declaration of Taking assembly was forwarded to the Assistant Secretary of the Air Force. However, the Government filed an affidavit⁹ to which there was attached a photostatic copy of a copy of a letter addressed to the Attorney General, which bears a rubber-stamp signature "E. V. Huggins, Assistant Secretary of the Air Force;" the letter refers to the action, *United States v. 1,710.73 Acres of Land*, and to the "Enclosed Declaration of Taking No. 2 to be filed in said proceeding for the condemnation of the fee simple title to 360 acres of land . . . as described in the Declaration of Taking" [R. 109]. That document contains the statement:

"The lands described in the enclosed declaration of taking are not included in the pending condemnation proceeding. It is, therefore, requested that prior to the filing of the enclosed declaration of taking you take the necessary action to amend the complaint and other pleadings on file in the proceeding so as to include the 360, acres of land referred to above and set forth in the enclosure hereto" [R. 110].

⁸The letter showing alterations is reproduced in the printed record at page 102. The number "1201" has been stricken and the number 1253 was substituted; the words "It will be necessary to Amend Comp." were stricken, and the words "See Report of negotiations to date att. hereto" are added in pencil; the words ("Pancho Barnes tracts)" appear as pencilled additions.

⁹The Affidavit of Richard A. Lavine appears in the printed record at pages 99 *et seq.*

The photostatic copy of this document does not bear any letterhead. The date was not typed. The date "Feb. 3, 1953" appears in the document filed with the Court¹⁰ in pen and ink, followed by the marginal notation "R.A.L."

The Government filed with the Court a photostatic copy of a letter dated February 5, 1953, from James M. McInerney, Assistant Attorney General, in Washington to Walter S. Binn, United States Attorney in Los Angeles, enclosing a "certified copy of a letter dated February 3, 1953, from the Honorable E. V. Huggins" [R. 111] requesting

"the amendment of the condemnation proceeding entitled United States v. 1, 701.73 Acres of Land . . . Civil No. 1201-ND, and the filing of Declaration of Taking No. 2, together with an original and two copies thereof" [R. 111-12].

The letter further stated:

"Please prepare and file an amended complaint including the additional land described in the enclosed Declaration of Taking No. 2, file the declaration and obtain the entry of a decree thereon providing for immediate possession of the land . . ." [R. 112].

On February 20, 1953, August Weymann prepared a letter for the signature of Walter S. Binns, United States Attorney, in which he requested authority from the Attorney General to file a separate action to condemn the property described in Declaration of Taking No. 2

¹⁰The original document appears as pages 128-129 of the type-written record on appeal; the printed copy of the document appears in the record at pages 109-110, but the characteristics of the original to which the Court's attention has been directed cannot be observed in the record as printed.

[R. 113, 114, 130, 132]. The Government produced a copy of a telegram dated February 25, 1953, received the following day, from an Assistant Attorney General to Walter S. Binns, which stated:

“Reurlet February 20 Civil 1201ND. Satisfactory to institute new case covering land declaration of taking 2” [R. 121].

August Weymann prepared a complaint in condemnation for the subject property and filed it on February 27, 1953. The case was numbered 1253-ND. On the same date, August Weymann altered the Declaration of Taking in the manner heretofore described [R. 133] and filed it [R. 12].

Neither the Assistant Secretary of the Air Force nor the Attorney General could possibly have seen or approved the alteration of the Declaration of Taking *before* it was filed. The document could not have been changed in Los Angeles, sent to Washington, and filed in Los Angeles on the same day.

It is equally apparent from the documents filed by the Government, that the Secretary of the Air Force, the Assistant Secretary of the Air Force and the Attorney General never saw the altered documents after they were filed in this action.

On March 3 and 4, 1953, the United States Attorney sent copies of the Complaint and the *Decree* on Declaration of Taking to the District Engineer and to the Department of Justice in Washington [R. 122, 123]. On March 17, 1953, the Attorney General wrote to the Secretary of the Air Force in respect of the proceeding and sent to him “certified copies of the complaint in condemnation and the *decree* on declaration of taking”

[emphasis added. R. 128-129]. Neither the original Declaration of Taking showing alterations, nor a “corrected” first page of the Declaration of Taking, nor any copy of the Declaration of Taking was sent to the Secretary of the Air Force or to the Assistant Secretary of the Air Force who executed the instrument.

3. THE ATTORNEY GENERAL HAD NO AUTHORITY TO,
AND DID NOT, AUTHORIZE THE ALTERATION OF THE
DECLARATION OF TAKING.

Congress delegated authority to acquire land for base expansion by condemnation to the Secretary of the Air Force, for the purposes and in the manner specified by Congress.¹¹

¹¹Act of June 17, 1950, Pub. L. 564, 64 Stat. 236, provides, in pertinent part, “The Secretary of the Air Force, under the direction of the Secretary of Defense, is hereby authorized to establish or develop installations and facilities by the construction, installation or equipment of temporary or permanent public works, including buildings, facilities, appurtenances and utilities as follows. . . . [64 Stat. at 242] Muroc Air Force Base, California: Quartermaster warehouse, electric system, *land for base expansion*, unconventional fuel storage, water system, radar and telemetering station, hangars, pavements, shop and warehouse, rocket static test facilities, barracks, \$26,654,280.” [Emphasis added.]

Public Law 564 was the statute upon which the Government relied as specific authority for the taking; the Government also relied on general statutes, the Act of Congress approved August 1, 1888, 25 Stat. 357, 40 U. S. C. Sec. 257; Act of Congress approved August 18, 1890, 26 Stat. 316, as amended July 2, 1917, 40 Stat. 241 and April 11, 1918, 40 Stat. 518, 50 U. S. C. Sec. 171, which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935, 40 Stat. 610, 611, 10 U. S. C. Sec. 1343 a, b, and c, authorizing the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 28, 1947, 61 Stat. 495, the Act of Congress approved September 6, 1950, Pub. L. 759, appropriating funds for such purposes [R. 4].

Congress has also authorized a special procedure by which the acquiring authority may acquire title in the name of the United States without awaiting the outcome of the condemnation action: this is the Declaration of Taking Act, 40 U. S. C. A., Section 258a.¹²

Strict compliance with condemnation statutes is required, and, in determining compliance, statutes are strictly construed. (*Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F. 2d 297, 308 (8th Cir.); *United States v. 2.4 Acres of Land*, 138 F. 2d 294, 298 (7th Cir. 1943); *United States v. Bauman*, *supra*, 56 Fed. Supp. at 111-112:

“It was the intention of Congress that the declaration of taking should correspond with the allega-

¹²The statute provides: “In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaration that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—(1) A statement of the authority under which and the public use for which said lands are taken. (2) A description of the lands taken sufficient for the identification thereof. (3) A statement of the estate or interest in said lands taken for said public use. (4) A plan showing the lands taken. (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

“Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compen-

tions of the 'petition.' Unless the formalities prescribed by the enactment are strictly complied with, the title would not pass.")

The Attorney General is given authority to *commence* condemnation proceedings upon application to him by the condemning authority.¹³

A Declaration of Taking does not "commence" an action, since it cannot be filed until a condemnation suit has otherwise been started. The Declaration of Taking operates to acquire title immediately upon its being filed

sation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

¹³28 U. S. C. A. Sec. 257 provides: "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the *Attorney General of the United States, upon application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation* within thirty days from the receipt of the application at the Department of Justice." [Emphasis added.]

with the estimated compensation deposited [28 U. S. C. A. §258a *supra*].

The Attorney General is not given any authority to determine the time of acquiring title to condemned land. And he is not given any authority to exercise any discretion in deciding how and in what manner or when to file a Declaration of Taking. Congress has committed the determination of the time of acquisition of property, particularly by means of filing a Declaration of Taking, to the acquiring officer. (*United States v. 23.263 Acres of Land*, 45 Fed. Supp. 163 (D. C. Wash. 1942); *Cf. Matter of Townsend*, 39 N. Y. 171, 174 (1868); see Lavine, "Extent of Judicial Inquiry into Power of Eminent Domain," 28 *So. Cal. L. Rev.*, 369, 370, 371 (1955) ("The administrative agency or official must determine the time when the condemnation action is to be brought and the date when possession of the property shall be sought.").)

The filing of the altered Declaration of Taking in this case was contrary to the provisions of Section 258a; that statute states, in part, that

"the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition . . ."

The Declaration of Taking which was filed in this case was not the Declaration of Taking which was "signed by the authority empowered by law" because the instrument which had been signed was changed after it was executed. When it was signed, it applied to a different case.

Whatever may have been the authority of the Attorney General in respect of commencing a condemnation action

by filing an amended complaint or a new complaint, he had no authority to authorize the alteration of the Declaration of Taking or to authorize the filing of an altered Declaration of Taking, or to determine that the property should be taken at some time other than that directed by the Assistant Secretary of the Air Force.

Indeed, there is nothing in the record to show that the Attorney General did purport to authorize the filing of a Declaration of Taking which showed alterations on its face, or that the Attorney General knew that the alterations had been made without the consent of the Assistant Secretary of the Air Force.

Authority cannot be found from any source whatever for the alteration of the Declaration of Taking in the case at bar.

4. THE ALTERATION WAS MATERIAL.

A Declaration of Taking is not merely a pleading. It has the effect of an involuntary deed from the landowner to the Government.¹⁴ The conveyance thereby made passes title to the Government without any prior notice or opportunity to be heard.¹⁵

This Court defined the term "material alteration" and discussed the effect of such a change in *Southern California Edison Co. v. Hurley*, 202 F. 2d 257 (9th Cir. 1953). A bank had altered an assignment of stock interest by changing the assignees' designation from Elizabeth J. Price *or* George Burton, to Elizabeth J. Price *and* George Burton, as joint tenants. The assignor,

¹⁴40 U. S. C. A. Sec. 258a, set out *supra*.

¹⁵The title conveyed to the Government is, however, defeasible, *Catlin v. United States*, 324 U. S. 229 (1944).

Hurley, had no knowledge of the change. This Court, speaking through Mr. Justice Pope, held the instrument invalid and said:

“It seems clear that if this unauthorized alteration was a material one, then the instrument was wholly void and the legal effect of its delivery to the defendant company was no different than if Hurley’s name had in fact been forged . . . The general rule is that ‘if the legal import and effect of the instrument is changed it does not matter how trivial the change may be, or whether it is beneficial or detrimental to the other party sought to be charged, it is a material alteration and invalidates the instrument.’ . . . In discussing the question of what constitutes a material change in a written instrument sufficient to render the same void, it was stated in *Laskey v. Bew*, 22 Cal. App. 393, 396, 134 Pac. 358, 360: ‘The materiality of the change, however, does not depend upon whether or not the party not consenting thereto will be benefited or injured by the change, but rather upon whether or not the change works *any* alteration in the meaning or legal effect of the contract . . . A material alteration is one that works some change in the rights, interests, or obligations of the parties to the writing.’”
[Emphasis added.]

The changes which are made in the Declaration of Taking filed in this action had the effect (a) of making the Declaration of Taking apply to a different action than that for which it was executed, and (b) of changing the *time* at which it could have been filed.

Assistant Secretary of the Air Force, E. V. Huggins, who executed the original document, was explicit in his directions to the Attorney General in respect of the Declaration of Taking he signed. The Assistant Secre-

tary directed that the Declaration of Taking be filed in the action entitled *United States v. 1710.73 Acres of Land*, No. 1201-ND *after* that action had been amended to include the subject property.¹⁶

The Assistant Secretary thus set the time for filing the Declaration of Taking as that date upon which the then pending action could be supplemented to bring the subject property within that action. In order to bring the subject property within that action, the Government would have had to file an amended and *supplemental* complaint. As Mr. Justice Fee stated in *United States v. Bauman*, 56 Fed. Supp. 109, 111 (D. Ore. 1943):

“[E]vents occurring subsequent to the filing of an original complaint must be set up by supplemental complaint rather than mere amendment.”¹⁷

Leave of court must be obtained before a supplemental complaint can be filed, although ordinary amendments may be made to a condemnation complaint without leave at any time before trial on the compensation issue.¹⁸

¹⁶The Secretary said: “The lands described in the enclosed declaration of taking are not included in the pending condemnation proceeding. It is, therefore, requested that prior to the filing of the enclosed declaration of taking you take the necessary action to amend the complaint and other pleadings on file in the proceeding so as to include the 360 acres of land referred to above and set forth in the enclosure hereto.” [R. 110.]

¹⁷The *Bauman* case was decided before the Federal Rules of Civil Procedure were made applicable to condemnation cases. But Federal Rule of Civil Procedure Rule 15(d) prescribes the same procedure.

¹⁸Rule 71A of the Federal Rules of Civil Procedure applies specifically to condemnation cases; Rule 71A(f) permits the amending of pleadings without leave of court, but in terms it does not encompass supplemental pleadings. Rule 71A(a) makes the Federal Rules applicable to condemnation actions, except where inconsistent with the express provisions of Rule 71A(a). Since there is no provision in Rule 71A applying to supplemental pleadings, Rule 15(d) applies, requiring leave of court to file a supplemental pleading.

The alteration of the Declaration of Taking necessarily changed the date upon which title could pass to the Government.

The reasons are as follows: (a) a Declaration of Taking cannot be filed *before* a Complaint in condemnation is filed;¹⁹ (b) the Declaration of Taking executed by the Assistant Secretary in this case could not have been filed in the then pending action until that action had been amended and supplemented to include the property covered by the Declaration of Taking;²⁰ (c) an amended and supplemental complaint could not have been filed without leave of court duly obtained after filing an appropriate motion with moving papers;²¹ (d) the United States Attorney's office received the check for the estimated compensation to be deposited with the Declaration of Taking on February 20, 1953 [R. 113]; (e) motion day in the United States District Court, Southern District of California, Northern Division, is Monday;²² (f) the earliest Monday upon which the motion for leave could have been heard would have been Monday, March 2, 1953; (g) assuming, for argument, that the motion for leave were granted on the day it was sought, the amended and supplemental complaint could not have been filed before March 2, 1953, and, therefore, the Declaration of Taking as originally executed could not have

¹⁹28 U. S. C. A. Sec. 258a, stating, in part: "In any proceeding in any court of the United States . . . the petition may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States." See *United States v. Bauman*, *supra*, 56 Fed. Supp. 109.

²⁰*United States v. Bauman*, *supra*.

²¹*Ibid.*; Rules of Civil Procedure, Rule 15(d).

²²Local Rules of Southern District California, Rule 3(a).

been filed and title conveyed to the Government before that date; (h) the altered Declaration of Taking was filed February 27, 1953.

The date of the filing of the Declaration of Taking is highly material in a condemnation action, since that date is the date of taking of the property and, therefore, the date as of which the valuation is made [28 U. S. C. A. §258a]. It is the date from which interest accumulates on the ultimate award.²³

An alteration of an instrument by changing the date thereof or entering a date where none is given which has some effect upon the rights of the parties is a material alteration. (*United States v. McCain*, 1 F. 2d 985 (E. D. Pa. 1924) (alteration of a date in court records); *Morley-Murphy Co. v. Van Vreede*, 233 Wis. 1, 269 N. W. 664, 666 (1936) (changing date of payment in a contract); *Fitzgerald v. Lawson*, 78 A. 2d 527 (N. H. Sup. Ct. 1951) (change in date of real estate broker's contract); See, Williston, "Discharge of Contracts by Alteration," 18 *Harv. L. Rev.* 165, 168 (1904).)

B. The Altered Declaration of Taking Was Void.

The material alteration of an instrument without authority or consent renders the instrument void. (*United States v. Galbraith*, 2 Black. [67 U. S.] 394

²³28 U. S. C. A. Sec. 258a, stating, in part "[S]aid compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property *as of the date of taking, from said date to the date of payment.* . . ." (Emphasis added.)

(1862) (alteration of deed by interlineation made after execution of the deed will avoid it, though in an immaterial part); *Morris's Lessee v. Vanderen*, 1 Dall. [1 U. S.] 64 (1672); *Southern California Edison Co. v. Hurley*, 202 F. 2d 257 (9th Cir. 1953); *Fitzgerald v. Lawson*, 78 A. 2d 527 (N. H. 1951); *Wyman v. Utech*, 256 Wis. 234, 40 N. W. 2d 378 (1949); *Ark-La Elec. Corp. v. Randall*, 205 Ark. 646, 169 S. W. 2d 61 (1943); *Ruwaldt v. W. C. McBride, Inc.*, 388 Ill. 285, 57 N. E. 2d 863 (1944); *Montgomery v. Bank of America*, 85 Cal. App. 2d 559, 193 P. 2d 475 (1948).)

Since the Declaration of Taking was void, the action should be treated as if no such instrument had been filed. Title could not pass to the United States as of the date of the filing of the Declaration and the deposit of estimated compensation.

It is well settled that, in absence of filing of a Declaration of Taking, title passes to the United States at that time the United States pays and the condemnee receives just compensation for his property. (*United States v. Rogers*, 255 U. S. 163 (1920); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890); *Moody v. Wickard*, 136 F. 2d 801 (D. C. Cir. 1943), *cert. denied* 320 U. S. 775 (title does not pass until payment of just compensation even though the Government may be in actual possession of the property before that time); *Hanson Lumber Co. v. United States*, 261 U. S. 581, 587 (1923).)

II.

The Ex Parte Decree Entered Upon the Altered Declaration of Taking Was Invalid.

The *ex parte* "judgment" confirming title in the United States is not a judgment at all. It adds nothing to the Declaration of Taking. (*United States v. Sunset Cemetery Co.*, 132 F. 2d 163, 164 (7th Cir. 1942); *United States v. 16,572 Acres of Land*, 45 Fed. Supp. 23 (D. C. S. D. Tex. 1942); *United States v. 12,918.28 Acres of Land*, 50 Fed. Supp. 712 (W. D. La. 1943).) The decree itself cannot constitute a judgment because it is entered without any prior notice or opportunity to be heard.²⁴

If the Declaration of Taking is a nullity, the *ex parte* judgment entered upon is it likewise a nullity. (Cf. *McKendry v. United States*, 219 F. 2d 357 *supra*; *City of Oakland v. United States*, 124 F. 2d 959, 963 (9th Cir. 1942).)

²⁴The United States Supreme Court has characterized a judgment of condemnation, without prior notice or opportunity for hearing, as "a solemn fraud" and not a judicial act at all. *Windsor v. McVeigh*, 93 U. S. 277, 278, 279 (1876). To the same effect, *Hassall v. Wilcox*, 130 U. S. 493 (1888). The principle is implicitly recognized by the Court in *Catlin v. United States*, *supra*, 324 U. S. 229 (1944).

III.

The Government Failed to Sustain Its Burden of Proving Instruments Were Altered With Authority and Consent of the Assistant Secretary of the Air Force.

Not only did the Government claim rights founded upon a Declaration of Taking showing alterations on its face, but the Government also relied upon other documents which had apparent alterations.²⁵

The proponent of an instrument bearing apparent alterations has the burden of explaining the alterations and of establishing that they were made under such circumstances that they do not affect the proponent's right to recover.

Thus, in *Smith v. United States*, 2 Wall. [69 U. S.] 219, 231, 232 (1864), the United States brought suit against a surety on a faithful performance bond which showed an erasure of one of the names on the face of the bond. The Supreme Court held the lower court erred in permitting the bond to be introduced in evidence by the Government, because the Government had failed to sustain its burden of proving consent by the defendant to the alteration. Mr. Justice Clifford, speaking for the Court, said:

“[A] party claiming under an instrument which appears on its face to have been altered [is] bound

²⁵The documents referred to are certain of the instruments attached to the Affidavit of Richard A. Lavine, filed by the Government in opposition to appellants' motions to dismiss and set aside the Declaration of Taking and the *ex parte* judgment thereon [R. 99 *et seq.*].

to explain the alteration and show that it had not been improperly made.” [P. 231.]

.

“[T]he party producing the instrument and claiming under it . . . [must] show that the alteration was made under such circumstances that it does not affect his right to recover.”

In *United States v. McCain*, 1 F. 2d 985 (E. D. Pa. 1924), the Court held inadmissible court records and an affidavit in which certain dates had been changed. The Court said the proponent of a document showing alteration must account for them. At 986, the Court said:

“[There is] no rule of evidence which makes an apparent material alteration in a writing evidence, even if it produced as a court record, unless the party producing it offers evidence to show that the alteration was made before the paper was signed. . . .”

The Court in *Ruwaldt v. W. C. McBride, Inc.*, 388 Ill. 285, 57 N. E. 2d 863, 867 (1944), holding an oil lease void by reason of the striking through of certain clauses in the lease said:

“Where an alteration in a deed is admitted or where it is established by inspection, the burden of proof shifts to the person claiming the benefit of the instrument, as altered, to show the alteration was made under circumstances rendering it lawful [citations omitted].”

The Government completely failed to establish that the alterations were proper. In effect, it admitted that the changes in the Declaration of Taking were made after

the instrument had been executed by the Assistant Secretary of the Air Force [Affidavit of August Weymann, R. 133-134; 553-554]. The Government introduced no competent evidence²⁶ to establish the existence of any authority to change the Declaration of Taking. On the contrary, the testimony of Joseph F. McPherson, an United States Attorney, clearly indicated that there was no such authority from the Assistant Secretary of the Air Force, or anyone else.²⁷

No explanation of any kind was offered by the Government in respect of the alterations apparent on the face of the documents attached to the Affidavit of Richard A. Lavine.²⁸

²⁶Certain documentary evidence relied upon by the Government was not competent because the documents were not properly authenticated. The point is discussed in the section hereafter following.

²⁷In response to the question, "Was there any authority ever from the Secretary of Air who made the paper [the Declaration of Taking]?", Mr. McPherson testified: "None would be required, and as far as I know no express authorization or direction was given to him. . . ." [R. 554.] Mr. McPherson was asked whether any certified copy of the "corrected" declaration of taking was sent to the Secretary of the Air Force or the Attorney General [R. 555, 556]; Mr. McPherson testified that "I don't know that there was any. Ordinarily we would not transmit the declaration back to the Attorney General. . . ." [R. 556.] He was asked whether "[T]he United States Attorney's office or . . . the Air Force headquarters . . . ever had a true, corrected copy, as we have seen it, of the declaration of taking." Mr. McPherson testified, "Not according to my file there wasn't. . . ." [R. 557.]

²⁸Interlineations and other changes were made on the face of the document identified as Exhibit 1 attached to the Affidavit [R. 102]; a date was added on the copy of a letter from Col. Shuler to the Division Engineer [R. 103]; a date was added and handwritten initials appear on the document identified as Exhibit 2, the letter from the Air Force Secretary to the Attorney General [R. 109]; additions in handwriting were made to the telegram from the Assistant Attorney General to the United States Attorney [R. 121].

The Court permitted the documents to be filed with the Affidavit, without allowing objections to them.²⁹

The Government utterly failed to establish authority for acquiring title by means of the altered Declaration of Taking, and it also failed to lay any proper foundation for the receipt of documents which had apparent changes on them.

IV.

The Trial Court Committed Prejudicial Error in Receiving Into Evidence and Considering Inadmissible Documents in the Hearing Upon Appellants' Motions to Set Aside the Declaration of Taking.

The sole document purporting to constitute authorization by the Assistant Secretary of the Air Force to institute the condemnation action, and to file a Declaration of Taking in this action was a document identified as Exhibit Number Two, attached to the Affidavit signed by Richard A. Lavine [R. 109-110].

²⁹Appellants attempted to object to the introduction of matters contained in Affidavits filed by the Government on the hearing of appellants' motions to set aside the Declaration of Taking. At 570 of the Record, the following appears:

"The Court: 'Do you want to submit that [affidavit of General Hottoner] as an exhibit?' Mr. McPherson: 'Well, I just offer it in evidence. It is an affidavit.' The Court: 'Yes.' Miss Barnes: 'May I read it first to see if I want it in evidence?' Mr. McPherson: 'You don't have any choice in the matter.' The Court: . . . 'Ordinarily these motions of this type are heard upon affidavits. The affidavit should be filed. You have furnished a copy to Mrs. Barnes?' Mr. McPherson: 'Yes.' The Court: 'And likewise the affidavits of Mr. Weymann and Mr. Lavine will be filed.'"

Appellants did, however, complain of the alterations and additions in the documents, including the Declaration of Taking, and urged the inadmissibility of such documents in their motion to set aside the Declaration of Taking [R. 90-91] and answering Affidavit [R. 147-149].

This document was not admissible in evidence and could not properly be considered by the District Court, because the document was neither an original nor a duly authenticated copy of an original document.

The document was a photostatic copy of a certified copy of a letter.³⁰ No attempt was made to produce or introduce a certified copy of the original letter.³¹

There was also attached to the Affidavit a photostatic copy of a copy of a letter from the Attorney General to Harold E. Talbott, Secretary of the Air Force [R. 128-29]. It is not certified or otherwise authenticated.³²

Similarly the Exhibits identified as 4, 6, 8, 9, 10, 11 and 12 are photostatic copies of copies.

None of these documents is a duly authenticated copy of an official document as required by Section 1733(b) 28 U. S. C. A.³³

None of the documents was admissible or should have been considered by the trial court. The precise question

³⁰The characteristics of the document do not appear in the printed record. The characteristics do, however, very clearly appear in the handwritten record, at pages 127-128, from which the printed record was prepared.

³¹The unexplained alterations, previously discussed, are also grounds for refusing admission of the document into evidence.

³²Mr. Lavine's affidavit states simply: "I have examined the official office files of the United States Attorney's Office pertaining to the above entitled case and found therein the documents as set out below. True photostats of such documents are attached hereto and incorporated herein as though at length set forth." [R. 99.] In the case of documents which are themselves copies, hereafter photostated, all Mr. Lavine's affidavit can possibly affirm is that these are true copies of copies; he cannot aver that they are true copies of the originals.

³³The statute provides: "*Properly authenticated* copies or transcripts of any books, records, papers, or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof." (Emphasis added.)

has recently been decided by the Court of Appeals for the Second Circuit in *Yung Jin Teung v. Dulles*, 229 F. 2d 244 (2d Cir. 1956). The Court was considering the propriety of the granting of the Government's motions for summary judgments in actions by ten plaintiffs to obtain declarations of citizenship. The matter was heard on affidavits. Plaintiffs' affidavits raised the issue that the Government had denied their rights as citizens by refusing to issue travel documents to them. The Court held the granting of summary judgments was improper because the Government introduced no affidavits or documents which could properly be considered as evidence; therefore, the statements of the plaintiffs in their affidavits were uncontradicted. At 246, the Court said:

"At the outset we must consider whether in any of the cases the government has presented any evidence or affidavits which were entitled to the consideration of the District Court. In each case the affidavit of the Assistant United States Attorney is not made on personal knowledge, but merely recites what is contained in the documents attached thereto. *Since the documents themselves are not affidavits, we can consider them only if they constitute evidence which would be admissible at trial.* [Emphasis added.]

"[T]he basic document is a photostatic copy of a paper entitled 'Status Reports of Pending Cases in which Civil Actions Have Been Filed.' Each such report contains information as to the history of the passport application and comments under a heading entitled 'Principal cause of delay in concluding case.' Each contains at the bottom after the words 'Examined by' the signature of an otherwise unidentified individual. Each is accompanied by a photostatic copy of a certificate signed by an authenticating of-

ficer of the Department of State for the Secretary or Acting Secretary. The certificate states only that 'the document hereunto annexed is a pertinent document from the passports files of [the particular applicant].' In another case . . . the documents are the same except that the 'Status Report' is a typewritten copy rather than a photostat. And in another . . . the 'Status Report' is a typewritten copy and there is no certificate of the kind described above.

"We are of the opinion that these 'Status Reports' are not admissible as evidence and that the District Court should not have considered them on the motion for summary judgment. They are not 'books or records of accounts or minutes of proceedings' within the meaning of 28 U. S. C. A. section 1733(a). *They are not properly authenticated copies* as required by 28 U. S. C. A. section 1733(b), 1740, and Rule 44 F. R. C. P., 28 U. S. C. A. *Both the typewritten copies and the photostatic copies are uncertified. Even the certificate described above appears in the file only as a photostatic copy of the original certificate.* * * * [Emphasis added.]³⁴

Appellants urge that the receipt of these unauthenticated, and, in some instances, altered, documents, was judicial error, by reason of which appellants' are entitled to a new trial on the issue of the authenticity of Declaration of Taking which was filed in this action.

³⁴An additional ground for inadmissibility in that case was the lack of personal knowledge of the writer of the document of the facts therein recited.

Conclusion.

The taking of private property for public use frequently works severe hardship on the landowner, which is true in the case of appellants. Appellants have not only been deprived of their land for which compensation has been paid, but also they have been deprived of their going business and the good will which was a part of it for which they have been paid nothing. They have not received even their moving expenses, although they have made application therefor.

The practical possibilities of attacking the appropriation of private property in a condemnation action are minute. Attack in Congress is virtually impossible because the landowner has no prior right to be heard in respect of a project for which his land may be taken; a change in legislation after his property has been taken can give him nothing but spiritual comfort. Attack in the courts is narrowly restricted since the administrative determinations involved in the taking are well insulated from judicial review.

The landowner whose land is to be taken by condemnation has but one protection: the taking must be made under and by virtue of statute. The question whether the statutes under which the taking authority has acted have been fully and strictly followed is a judicial question. It is this question which this Court is earnestly urged to consider in the case at bar.

The Government purportedly took title under the Declaration of Taking Act. The Act permits the use of summary procedure to take private land. The Government made the choice of using this procedure, and, having done so, it should be required to follow all its requirements exactly. The Government did not strictly comply with statutory authority in this case. The Declaration of Taking was materially altered without the knowledge or consent of the Air Force Secretary, whose duty it was to determine what should be taken for the project, how it should be taken, and when it should be taken. The Government did not send the Declaration of Taking to the Secretary to obtain his approval for altering it. For aught that appears the Government did not make any substantial effort to explain what had been done; it did not attempt to introduce properly authenticated documents to support its actions. The Government should have, and should have, the burden of explaining the alterations in the documents in this case. It should have that burden because the opportunity of the landowner to offer direct evidence on this subject is very limited.³⁵

Under the circumstances of this case, title should not pass to the Government by virtue of the Declaration of

³⁵The difficulties which beset a landowner attempting to prove the Government's condemning authority to comply with his statutory duties are well illustrated in *United States v. Richardson*, 4 F. 2d 552 (5th Cir., 1953), in which Government officials thwarted every effort of the landowner to utilize ordinary discovery procedures until the Court stayed the action.

Taking herein filed, without, at the very least, a new trial in which the issue of the validity of the Declaration of Taking can fully be tried and in which the decision of the Court shall be made upon evidence properly admissible.

Respectfully submitted,

BEARDSLEY, HUFSTEDLER & KEMBLE,
Attorneys for Appellants.

No. 15582

United States
Court of Appeals
for the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY, a
corporation, Appellant,
vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

AUG - 5 1957

PAUL P O BRIEN, CLERK



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Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court
District of Oregon

Civil Action No. 8429

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant.

COMPLAINT

For cause of action again defendant, plaintiff alleges:

I.

Jurisdiction of this Court in this action is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and Acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is a corporation incorporated under laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate

Commerce Act (Title 49 USCA, Sections 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon, and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern Districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 50 carload shipments of frozen foods and vegetables with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954.

V.

The lawful tariffs of the plaintiff and said other connecting common carriers by railroad, involved in the transportation of such shipments from Ontario, Oregon, to such destinations, provided that charges of \$61,934.38 be made by said rail carriers for such transportation service and other charges incidental thereto, which sum the defendant became obligated to pay to the plaintiff upon acceptance of such shipments by the plaintiff for transportation. The defendant has paid to the plaintiff a total sum of \$56,047.81 toward such charges, leaving a balance of \$5,886.57, together with Federal transportation tax on such balance, amounting to \$176.90, or a total sum of \$6,063.47, unpaid and owing from the defendant to the plaintiff; but, notwithstanding repeated demands by the plaintiff for payment thereof, the defendant has failed, neglected and refused, and still refuses, to pay said sum of \$6,063.47, or any part thereof; and said sum of \$6,063.47 is now due and owing from the defendant to the plaintiff.

Wherefore, plaintiff seeks judgment against defendant in the sum of \$6,063.47, together with its costs and disbursements herein incurred.

/s/ ROY F. SHIELDS,

/s/ JOSEPH G. BERKSHIRE,

Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1956.

[Title of District Court and Cause.]

ANSWER

Defendant admits the allegations of the Complaint, except those stated in Paragraph No. V and those it denies except it admits it has not paid the plaintiff the sum of \$6063.47.

By way of counterclaim against the plaintiff, defendant alleges:

I.

Jurisdiction of this Court in this counter-claim is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and Acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is a corporation incorporated under laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, Sections 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and, subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon, and various desti-

nations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern Districts of the United States for distribution and sale.

IV.

Commencing on or about March 13, 1954, and continuing until on or about April 28, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 69 car-load shipments of frozen foods and vegetables with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern Districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by defendant. The first of said shipments was so delivered on or about March 20, 1954.

V.

The lawful tariffs of the plaintiff and said other connecting common carriers by railroad involved in the transportation of such shipments from Ontario, Oregon, to such destinations provided for

charges of \$26,583.08 be made by said railroad carriers for such transportation services and other charges incidental thereto. That the plaintiff erroneously charged the defendant for such shipments a total of \$32,562.13 notwithstanding the proper charges were the sum of \$26,583.08, leaving an overpayment in the sum of \$5979.05. That the defendant has demanded repayment of these overcharges from the plaintiff and there is now due, owing and unpaid from the plaintiff to the defendant the sum of \$5979.05 which the plaintiff has failed, neglected and refused and still refuses to pay.

Wherefore, defendant prays that the plaintiff take nothing by way of its Complaint and that defendant have Judgement against the plaintiff for the sum of \$5979.05 together with its costs and disbursements herein incurred.

/s/ P. J. GALLAGHER,

/s/ MARTIN P. GALLAGHER,

Attorneys for Defendant.

CERTIFICATE OF SERVICE

State of Oregon

County of Malheur—ss.

I hereby certify that on this date I served the within paper upon Randall Kester, one of attorneys for plaintiff, by depositing in the United States Post Office at Ontario, Oregon, a correct copy of the whole thereof in a sealed envelope with postage prepaid addressed to him at his regular

office address at 727 Pittock Block, Portland 5, Oregon.

Dated at Ontario, Oregon, March 29, 1956.

/s/ MARTIN P. GALLAGHER

Of Attorneys for Defendant.

[Endorsed]: Filed April 9, 1956.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now the plaintiff and for its Reply to the alleged Counterclaim asserted by the defendant in this action, admits, denies and alleges as follows:

First Defense

1. Admits the allegations contained in paragraphs I, II, III and IV of said alleged Counterclaim.

2. Plaintiff denies each and all of the allegations contained in paragraph V of said alleged Counterclaim.

Second Defense

For its further and separate answer and affirmative defense to said alleged Counterclaim:

I.

Plaintiff alleges that the shipments contained in cars Nos. PFE 200481, PFE 200573, PFE 200040, PFE 200004, PFE 200699 and PFE 200663 were delivered to their consignees prior to April 9, 1954, and that the defendant's claims for alleged overcharges on said shipments have been barred by the statute of limitations.

II.

Plaintiff alleges that as to the balance of the shipments set forth in defendant's alleged Counterclaim, the charges collected by the plaintiff amounted to \$30,367.96, which were the full, true and lawful charges applicable to said shipments under the tariffs of the plaintiff and its connecting carriers.

Wherefore, having replied to the defendant's alleged Counterclaim herein, plaintiff prays that said Counterclaim be denied and that the plaintiff have judgment against the defendant for the full amount of \$6,063.47, together with its costs and disbursements herein incurred, as prayed for in its Complaint herein.

/s/ ROY F. SHIELDS,

/s/ JOSEPH G. BERKSHIRE,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Agreed Facts

I.

Jurisdiction of this Court in this action is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and

2), and acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under the laws of the State of Utah, and defendant was and now is a corporation incorporated under the laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, §1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 car-load shipments of frozen foods and vegetables including frozen potatoes with directions that each of

such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954.

V.

Trans-Continental Freight Bureau Freight Tariff 2 series and supplements thereto effective between January 6, 1954 and October 2, 1955, prescribed general commodity rates and charges for the transportation of various commodities, eastbound from points in Oregon to points in Eastern, Middle Western and Southern districts.

VI.

Item 4600 of said tariffs described in Paragraph V hereof prescribes carload rates on "food cooked, cured or preserved, frozen NOIBN in containers in boxes." The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed by Name".

VII.

Item 4715 of said tariffs described in Paragraph V hereof prescribes carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened), in

packages as prescribed in Western Classification (Subject to Notes 1 and 6).” Said Notes 1 and 6 do not affect the issue in this action and are accordingly not set forth.

VIII.

The correct charges for those portions of the shipments described in Paragraph IV hereof consisting of frozen potatoes computed in accordance with Item 4600 of said tariffs, including the Federal transportation tax thereon, total the amount of \$67,579.27.

IX.

The correct charges for those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes computed in accordance with Item 4715 of said tariffs, including the Federal transportation tax thereon, total the amount of \$56,011.18.

X.

The amounts paid by defendant to plaintiff as charges due on those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes, including the Federal transportation tax thereon, totaled \$61,342.41.

XI.

The potatoes referred to above were hauled from farmers’ fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

The oil blanching consisted of immersing the sliced potatoes in blanching oil at 350° F for one

and one-half minutes. They were partially browned by the oil blanching. They were cooled and quick-frozen to a temperature of -15° to -20° F, packaged, labeled, and stored in zero storage. They were shipped in refrigerated cars of the plaintiff. The purpose of blanching was to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing was to prevent spoilage and to preserve potatoes in a fresh condition.

Plaintiff's Contentions

I.

That the process described in Paragraph XI of the Agreed Facts involves the preparation of potatoes for consumption by the action of heat and renders the product a "food cooked, cured or preserved", within the meaning of Item 4600 of said tariffs described in paragraph V of the Agreed Facts.

II.

That by reason of the Agreed Facts hereinabove set forth the plaintiff is entitled to recover from the defendant as undercharges, including the Federal transportation tax, on the shipments described in Paragraph IV of the Agreed Facts the sum of \$6,236.86.

Defendant's Contentions

I.

That the process described in Paragraph XI of the Agreed Facts involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI of the

Agreed Facts, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs described in Paragraph V of the Agreed Facts as cooked foods.

II.

That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.

III.

That by reason of the Agreed Facts hereinabove set forth the defendant is entitled to receive from plaintiff as overcharges, including the Federal transportation tax on the shipments described in Paragraph IV of the Agreed Facts, the sum of \$5,331.24.

Issues to Be Determined

Were the potatoes which constitute the shipments described in Paragraph IV of the Agreed Facts "food cooked" as classified in Item 4600 of the tariffs described in Paragraph V of the Agreed Facts, or were said potatoes "vegetables, fresh" as classified in Item 4715 of said tariffs.

Dated this 13th day of February, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Plaintiff.

/s/ P. J. GALLAGHER,

/s/ MARTIN P. GALLAGHER,

Attorneys for Defendant.

The above Pre-Trial Order is approved and Issues for trial will be as herein settled. There will be no amendment to the Pre-Trial Order without the approval of the Court.

Dated this 13th day of February, 1957.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now plaintiff and moves the court for a summary judgment herein in favor of the plaintiff on the ground and for the reason that the pre-trial order agreed to by the parties and submitted to this court shows that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

This motion is based upon Rule 56, Federal Rules of Procedure, and in the opinion of the undersigned, is well founded in law and the same is not made for the purposes of delay.

/s/ ROY F. SHIELDS, H.E.R.

/s/ HOWARD E. ROOS,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 11, 1957.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

The defendant may submit Findings in defendant's favor.

Dated March 14, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on regularly at this time for Findings of Fact and Conclusions of Law, the Court makes the following:

Findings of Fact

I.

Jurisdiction of this Court in this action is found upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is

a corporation incorporated under the laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, Sec. 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 car-load shipments of frozen foods and vegetables including frozen potatoes with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad

duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954. That the shipments on which defendant bases its counter-claim were made between April 9, 1954, and April 28, 1955.

V.

Trans-Continental Freight Bureau Freight Tariff 2 series and supplements thereto effective between January 6, 1954 and October 2, 1955, prescribed general commodity rates and charges for the transportation of various commodities, eastbound from points in Oregon to points in Eastern, Middle Western and Southern districts.

VI.

Item 4600 of said tariffs described in Paragraph V hereof prescribes carload rates on "food cooked, cured or preserved, frozen NOIBN in containers in boxes." The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed by Name."

VII.

Item 4715 of said tariffs described in Paragraph V hereof prescribes carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened), in packages as prescribed in Western Classification (Subject to Notes 1 and 6)." Said Notes 1 and 6 do not affect the issue in this action and are accordingly not set forth.

VIII.

The correct charges for those portions of the shipments described in Paragraph IV hereof consisting of frozen potatoes as computed in accordance with Item 4600 of said tariffs, including the Federal transportation tax thereon, total the amount of \$67,579.27.

IX.

The correct charges for those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes computed in accordance with Item 4715 of said tariffs, including the Federal transportation tax thereon, total the amount of \$56,011.18.

X.

The amounts paid by defendant to plaintiff as charges due on those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes, including the Federal transportation tax thereon, totaled \$61,342.41.

XI.

The potatoes are hauled from farmers' fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

The oil blanching consists of immersing the sliced potatoes in blanching oil at 350° F for one and one-half minutes. They are partially browned by the oil blanching. They are cooled and quick-frozen to a temperature of —15° to —20° F, packaged, labeled, and stored in zero storage. They are shipped in refrigerated cars of the plaintiff. One purpose

of blanching is to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing is to prevent spoilage and to preserve potatoes in a fresh condition.

XII.

That the potatoes herein do not lose their substantial identity in the process described in Par. XI above and are frozen fresh vegetables.

That the potatoes are not a frozen cooked food.

Based upon the above Findings of Fact the Court makes the following:

Conclusions of Law

I.

That the process described in Paragraph XI above involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI above, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs described in Paragraph V of the Agreed Facts as cooked foods.

II.

That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.

III.

That by reason of the above the defendant is entitled to recover from plaintiff as overcharges, including the Federal transportation tax on the

Dated at Portland, Oregon, March 18th, 1957.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Union Pacific Railroad Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 18th day of March, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant Union
Pacific Railroad Company.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the plaintiff, Union Pacific Railroad Company, a corporation, in the above entitled and numbered cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment and the whole thereof, and each and every part thereof, made and entered in the above Court and cause on or about the 18th day of

March, 1957, in favor of the defendant and against the plaintiff, and providing as follows, to-wit:

“It Is Hereby Ordered that the defendant Ore-Ida Potato Products, Inc. be and it hereby is granted judgment against the plaintiff Union Pacific Railroad Company in the sum of Five Thousand Three Hundred Thirty - one and 24/100 Dollars (\$5,331.24) together with interest thereon from April 28, 1955, at the rate of six (6%) per cent per annum and that execution issue.

“Dated at Portland, Oregon, March 18, 1957.
/s/ Claude McColloch, District Judge”

Now, Therefore, in consideration of the premises and of such appeal, we the said plaintiff and appellant herein and Continental Casualty Company, a corporation organized and existing under the laws of the State of Illinois, do hereby jointly and severally undertake and agree, on the part of said plaintiff-appellant that said plaintiff-appellant will pay all damages, costs, interest, damages for delay, and disbursements which may be awarded against it on said appeal.

And Whereas, the plaintiff-appellant is desirous of staying execution of the judgment so appealed from, we do further in consideration thereof jointly and severally undertake and agree that if said judgment appealed from or any part thereof be affirmed, the said plaintiff-appellant, Union Pacific Railroad Company, a corporation, will satisfy the same so far as affirmed.

Done at Portland, Oregon, this 12th day of April,
1957.

UNION PACIFIC RAILROAD

COMPANY, a corporation,

/s/ By ROY F. SHIELDS,

Of Its Attorneys, Principal, and

[Seal] CONTINENTAL CASUALTY

COMPANY,

/s/ By H. F. WESTENFELDER,

Attorney in Fact.

Countersigned:

[Seal] TATE, WESTENFELDER & BERG,
INC.,

Resident Agent,

/s/ By H. F. WESTENFELDER.

April 17th, 1957.

/s/ CLAUDE McCOLLOCH.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 17, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

On motion of plaintiff-appellant, and good cause
appearing therefor, it is

Ordered that the Clerk of this Court forward to
the United States Court of Appeals for the Ninth
Circuit in connection with the appeal of this cause
the original papers, including Exhibits 1 and 2,
which have been designated by the plaintiff-

appellant for inclusion in the record on appeal, in accordance with the usual practice of this Court in regard to the safekeeping and transportation of such papers and exhibits.

Done in open Court this 17th day of April, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 17, 1957.

[Title of District Court and Cause.]

ORDER AMENDING ORDER FOR
TRANSMITTAL OF EXHIBITS

On motion of plaintiff-appellant, and good cause appearing therefor, it is

Ordered that the directory provision of the order of this Court in the above-entitled action dated April 17, 1957 be amended to read as follows:

“Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit in connection with the appeal of this cause the original papers, including Exhibits 4 and 5, which have been designated by the plaintiff-appellant for inclusion in the record on appeal, in accordance with the usual practice of this Court in regard to the safekeeping and transportation of such papers and exhibits.”

Done in open Court this 14th day of June, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

1956: DOCKET ENTRIES

Jan. 17—Filed complaint.

17—Filed and entered order appointing person to make service.

17—Mailed summons to John C. Elfering, Vale, Oregon, for service.

Feb. 6—Filed summons with return.

10—Filed stipulation.

10—Filed motion.

10—Filed and entered order extending time for defendant to appear 60 days.

Apr. 9—Filed answer, and certificate of service.

9—Filed defendant's request for jury trial.

20—Filed motion.

20—Filed and entered order extending time for filing of reply to May 31, 1956.

May 31—Filed reply to counterclaim.

Nov. 3—Entered order setting for Pre-Trial Conference January 7, 1957.

1957:

Jan. 7—Lodged Pre-Trial order.

17—Entered order setting for trial on February 12th.

Feb. 5—Entered order resetting for trial on February 13th, 1957.

11—Filed Motion for Summary Judgment.

13—Entered order denying above motion.

13—Record of Hearing by court (trial)—entered order that all briefs be filed before March 11th.

13—Filed Pre-Trial Order.

1957:

Mar. 4—Filed defendant's memorandum.

11—Filed plaintiff's reply memorandum.

11—Filed plaintiff's supplemental memorandum.

11—Filed defendant's reply brief.

14—Filed Memorandum of Decision. Defendant to submit findings in its favor.

18—Filed and entered Findings of Fact and Conclusion of Law.

18—Filed and entered Judgment.

Apr. 15—Filed notice of appeal by plaintiff.

16—Filed designation of record on appeal.

16—Filed statement of points.

16—Filed affidavit of service.

16—Filed motion for transmittal of exhibits to Court of Appeals.

17—Filed and entered order to transmit exhibits to Court of Appeals.

17—Filed supersedeas bond on appeal.

24—Filed defendant's additional designation of record on appeal.

May 15—Filed transcript of proceedings.

17—Filed motion to extend time to docket appeal in Court of Appeals.

17—Filed amendment to designation of record on appeal.

17—Filed affidavit of service of motion and amended designation.

20—Filed and entered Order extending time to file appeal to June 14, 1957.

June 6—Filed appellant's supplemental statement of points.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America

District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Certificate of service and answer; Reply to counterclaim; Pre-trial order; Motion for summary judgment; Memorandum of decision; Findings of fact and conclusions of law; Judgment; Notice of appeal; Statement of points; Supersedeas bond on appeal; Designation of record on appeal; Order for transmittal of exhibits; Amendment to designation of record on appeal; Appellant's supplemental statement of points; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8429, in which Union Pacific Railroad Company, a corporation, is the plaintiff and appellant and Ore-Ida Potato Products, Inc., a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, together with Exhibits 4 and 5.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of June, 1957.

[Seal] R. DE MOTT,
 Clerk,
 /s/ By THORA LUND,
 Deputy.

United States District Court
District of Oregon

No. Civil 8429

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, February 13, 1957.

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Mr. Howard E. Roos, of Attorneys
for Plaintiff; Mr. Martin P. Gallagher, of Attor-
neys for Defendant.

The Court: Union Pacific vs. Idaho Potato. I
have read the file. Is there any oral testimony?

Mr. Gallagher: Yes, there is some oral testimony,
your Honor.

The Court: All right. Put it on.

Mr. Roos: If your Honor please, I have a brief [1]* to submit on a motion for summary judgment.

The Court: Yes.

Mr. Roos: We have taken the position that this is a question of law for the Court only. Would you care to hear argument on it right now?

The Court: Have you any oral testimony?

Mr. Roos: We have none, and we had hoped to exclude it.

The Court: What?

Mr. Roos: I say, we had hoped to exclude any oral testimony.

The Court: You don't have any to offer at this time?

Mr. Roos: We have none ourselves, and we feel that no oral testimony is warranted.

The Court: I understand. There is no law that keeps them from putting on testimony. All right. Put on your testimony, Mr. Gallagher. [2]

EVAN GHEEN, JR.

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gallagher): Mr. Gheen, you work for the defendant, Idaho Potato Products Corporation?

A. Yes, I do.

Q. In what capacity?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Evan Gheen, Jr.)

A. My title is Assistant Sales Manager, and I have other duties relating to quality control and traffic.

Q. Ore-Ida Potato Products is located in Ontario, Oregon, is it not? A. That is correct.

Q. Tell me what products do they process there?

A. We process potatoes and corn and occasionally carrots, and we have a packaging operation on mixed vegetables.

Q. Generally, it is a quick-freezing plant for fresh vegetables?

A. A food processing and quick-freezing plant.

Q. Do you also handle stringbeans, lima beans and the mixed vegetable field? A. Yes, we do.

Q. Can you describe to the Court the process by which these particular products, lima beans, stringbeans, carrots [3] and potatoes are processed? Start in with the bringing of the product into the plant and the washing.

A. Would you repeat the question?

Q. Could you describe to us the process that is used in the plant for the fresh vegetables?

A. Any particular fresh vegetables, though?

Q. Any of them.

A. The product is brought to the plant from the grower's field, is weighed, washed, peeled, if necessary, and specked, as we think of it in cleaning up the product, and is blanched, inspected, given an additional washing and drying when necessary, and frozen and packaged. Sometimes that is reversed—packaged and frozen.

(Testimony of Evan Gheen, Jr.)

Q. Now, you speak of blanching. What is blanching?

A. The process of blanching is necessary in the preservation of food. You apply heat to the product by means of hot water or steam to inactivate the enzymes which contribute to the decomposition of the food if they are active.

Q. In an item such as corn and carrots how long does the blanching process take for the purpose of killing enzymes? A. May I refer to my notes?

Q. Yes, if you have some.

A. Cob corn, for example, would be blanched between seven and nine minutes at a temperature of 204 degrees. Cobbed corn would be blanched three and a half to four minutes at [4] a temperature of 204 degrees. Peas would be blanched up to three minutes at a temperature of 204 degrees.

Q. Then are they frozen after blanching?

A. Shortly after blanching, yes.

Q. And then stored and packaged or packaged and stored? A. Yes.

Q. Now, in the case of potatoes, which we are dealing with here, can you describe in some detail the precise process of handling potatoes?

A. Yes. The potatoes go through much the same process as other frozen foods. They are brought from the grower's field to the plant, are weighed and passed through a washer and a lye bath process.

Q. Excuse me. Would you repeat that?

A. The potatoes are brought from the grower's field to the plant, are weighed and passed through

(Testimony of Evan Gheen, Jr.)

a lye bath process which loosens the skin. They go from there to a specking table, where the ladies trim the eyes out, and such as that—any bad spots. They pass through a cutting machine into the blanchers, where they are water-blanced at a temperature of 190 degrees for a period of one minute plus or minus five seconds. They pass into an oil blanch, which is at approximately 350 degrees, but it may vary upward or downward, for a period ranging from one minute to a minute and 30 seconds, following which they pass through a drier, or something that [5] blows on them, into the deep freeze, following which they are packaged and stored.

Q. Now those are the French fries?

A. That is correct.

Q. Other potato products are potato patties and cubes; is that correct?

A. French cuts, patties and cubes.

Q. Now, is the process relative to them the same except for the oil blanching?

A. The process of oil-blanching is converted over into a water blanch. In other words, you increase the water-blanch time in an amount equivalent to the oil-blanch time.

Q. Those that do not have an oil blanch have a longer water blanch?

A. It is necessary to have—the answer is Yes.

Q. What is the purpose of blanching?

A. The purpose of blanching is to inactivate the enzymes.

(Testimony of Evan Gheen, Jr.)

Q. Is that accomplished in a longer water blanch and is it also accomplished in a shorter water blanch plus the oil blanch?

A. That is correct.

Q. Is there any other purpose in oil-blanching?

A. The only other purpose would be to coat the product with oil.

Q. Why is that desirable? [6]

A. Because the customer wants us to coat it with oil, as we can do it cheaper than he can.

Q. Is there any advantage relative to shipping?

A. There is an advantage both in the freezing and in shipping. If you don't coat it in oil, the product sometimes sticks together so that the shipper would have difficulty in separating the individual pieces. At the same time, it can be done. I wouldn't say that there is an advantage in shipping, no.

Q. Then after the oil blanching they are then frozen and then shipped? A. Yes.

Q. Now what is the method of preparation of the French fries by the ultimate consumer, either the housewife or the institutional user?

A. The institutional user will take out a case of French fries prior to the use of them and allow them to thaw for a period of time, following which he introduces them into his fryer and cooks them, to his own taste. Now, it is an interesting point here that the institutional users do not want us to do their job for them. They want the oil coat on the French fries, but they don't want us to cook

(Testimony of Evan Gheen, Jr.)

them to the color that they want, nor do they want a cooked product, as that would not work out well in their own work. A retail user or a housewife usually follows the directions [7] that are contained on the label of the package. The cooking instructions are shown on the label and vary from a period of 10 to 25 minutes at approximately 400 degrees in the oven or, alternatively, in deep fat she could fry them for a period ranging from one and a half to two minutes to two and a half minutes at a temperature above or below 350 to 400 degrees.

Q. Now, the cooking for 15 to 20 minutes, how is that accomplished? In an oven? A. Yes.

Q. And is the purpose of that just to thaw them out and warm them up, or is there any actual cooking in the process?

A. Oh, a potato that was introduced into an oven is thawed out and starts to warm up so that it is warm to the touch at the end of two to three minutes, depending on the potato.

Q. What happens after that?

A. The rest of the time is used for the actual cooking process.

Q. This product, if you took a package out and simply thawed it out to get rid of the freezing, would it be a palatable product?

A. Well, yes and no. You could swallow it, but it is not healthy so to do.

Q. Why do the institutional users want the oil on the potato?

(Testimony of Evan Gheen, Jr.)

A. Because it decreases the amount of oil that [8] is absorbed by the potato in their own fryer, and we can buy oil cheaper than they can, and we can coat the potato cheaper than they can, and it decreases the amount of time that is required to reconstitute the product in their own shop.

Q. Is the oil coated French fry a more valuable product than a French cut?

A. Approximately two cents a pound. It varies sometimes up to three cents a pound.

Q. Now you also have something to do with freight rates, do you not?

A. That is correct. Not with the rates, but with the use of traffic.

Q. You are acquainted with the various tariffs that you use there in the plant?

A. In a general sort of way.

Q. Tell us what the history of the freight rates has been there as to the classification of the pre-trial order, the classification of Item 4715?

A. Well, as we got into the potato-processing business we originally commenced the shipping of our potato items under the same classification. After a period of time we were instructed that the potatoes which had been oil-blanching, or French-fried, according to the term that you like to use, were to be classed as a cooked vegetable, whereas all of the other potato items, together with all of the other items [9] which we processed, were to be classified in a different group which is called a fresh frozen product. At that time there was a

(Testimony of Evan Gheen, Jr.)

difference in cost or in the rate of shipping these two classifications, and we had customers——

Mr. Roos: Excuse me, your Honor. I would like to object for the record to any testimony with respect to a period outside of that within which the shipments in question moved.

The Court: You may continue, subject to the objection.

Mr. Gallagher: Go ahead.

A. At the time that the processed potato was making momentum, our customers violently objected to paying the difference in rate between a potato which had been oil-blanching or French fried and one which had not. It worked a hardship on the whole industry, so our first step was to request our local carrier to introduce something which would re-classify——

Q. Let me interrupt you there, Mr. Gheen. As I understand it, all your products out of your plant went out under this Item 4715. Then the question was raised as to the so-called French fries, and you were requested to ship them under Item 4600; is that correct? A. That is correct.

Q. And for a period of time they continued to be shipped under 4715, and then after that period [10] of time you shipped them under 4600?

A. That is correct.

Q. In water-blanching a potato for a minute and a half in water, does that completely kill the enzymes?

(Testimony of Evan Gheen, Jr.)

A. No, it takes a longer blanching than that, as I guess I introduced here a little while ago.

Q. Now, was the freight rate under both of these items, 4600 and 4715, originally the same in dollars?

A. I think that depends how far back you go. At the time we commenced shipping the volume was different.

Mr. Gallagher: I think you may cross examine.

Mr. Roos: Mr. Gallagher, was it your intention to introduce these labels?

Mr. Gallagher: Your Honor, we have reserved a place in the pre-trial order for exhibits, and Counsel and I have agreed, subject to the approval of the Court, that we might introduce a few labels.

Q. Mr. Gheen, you have been handed Exhibits 1, 2 and 3, Defendant's Exhibits for Identification. Can you tell us what they are.

A. They are labels owned by three of the customers for whom we pack.

Q. Do they relate to French fries?

A. Yes. We pack quite a few French fries under these labels for these customers. [11]

Q. And they are used in the plant for packing some of the particular French fries that are under consideration here?

A. That is correct.

Mr. Gallagher: We offer Defendant's Exhibits 1, 2 and 3.

Mr. Roos: No objection.

The Court: Admitted.

(The labels above referred to were thereupon

(Testimony of Evan Gheen, Jr.)

received in evidence as Defendant's Exhibits 1, 2 and 3, respectively.)

Q. (By Mr. Gallagher): Do those exhibits give the cooking instructions in some instances?

A. Yes, they do.

Q. And that is for the housewife or the institutional consumer? A. That is correct.

Q. Mr. Gheen, you have been handed what have been marked for identification as Defendant's Exhibits 4 and 5. Would you tell us what they are.

A. This appears to be portions of Tariff 2-U which governs the shipping of most of our products.

Q. Directing your particular attention to one of the exhibits which has the item 4600, and your [12] particular attention to the second page with the little arrow, is that the item under which the railroad requested you to ship these French fries under Item 4600?

A. Yes, in that sense. I am not sure whether you would call it the railroad or the Classification Committee, but we were instructed to use it by both.

Q. In any event, that is the tariff that we are speaking of, is it not, No. 4600?

A. That is correct.

Q. Referring to the other exhibit containing Item No. 4715, on the first page thereof is an arrow. Is that the item under which you have shipped all of the products of the plant which are frozen?

A. Yes, we have shipped all of them under this group at one time, and at another time it was divided between the two.

(Testimony of Evan Gheen, Jr.)

Mr. Gallagher: We offer Defendant's Exhibits 4 and 5.

Mr. Roos: No objection.

The Court: They are admitted.

(The excerpts from the tariffs above referred to were received in evidence and marked Defendant's Exhibits 4 and 5, respectively.)

Q. (By Mr. Gallagher): Mr. Gheen, can you give us a comparison in the cooking time of the various products of the plant, [13] the corn on the cob and kernel corn, and the mixed vegetables, and also carrots as compared to the cooking time of French fries?

A. Do you mean the blanching time?

Q. No, no. A. Cooking time?

Q. Cooking time by the housewife.

A. In a general sort of way it is very much the same thing. I think that can be best demonstrated by one of the exhibits over here on which I base a comparison of the cooking time for the different vegetable items that are frozen.

Q. Let's take mixed vegetables.

A. I think in a general sort of way that you could say that these items require from 8 to 22 minutes that are compared on this particular chart, and mixed vegetables 15 to 18 minutes.

Mr. Roos: Mr. Gheen, which exhibit are you referring to?

A. This is Exhibit No. 2.

Q. (By Mr. Gallagher): Let's compare the po-

(Testimony of Evan Gheen, Jr.)

tato patty. How long does it take to cook a potato patty?

A. Approximately the same time that it takes to cook a French fried potato, from 10 to 25 minutes, depending on the taste of the housewife and the accuracy of her oven, and so forth. [14]

Q. And kernel corn?

A. Very much the same. Let's see what it says on here. It says 6 to 8 minutes on kernel corn here.

Mr. Gallagher: I think you may cross examine.

Cross Examination

Q. (By Mr. Roos): Mr. Gheen, you have indicated that your position with the defendant is as Assistant Sales Manager?

A. That is my title, yes.

Q. And have you been employed in the plant proper or in the laboratories?

A. I am employed in the plant proper in the sense that there is only one plant. It is all one connected plant.

Q. You have given certain testimony with respect to blanching times and cooking times, and so forth. I will ask is that testimony given from your own personal observations or tests which you have made in the course of your duties, or is it more or less by information derived from other employees?

A. It is from both. I have at times examined blanchers and fryers for time and temperature. The particular figures which I introduced here were not my figures alone, but the figures as agreed upon

(Testimony of Evan Gheen, Jr.)

by several members so that I would not bias or otherwise misrepresent the actual facts. So in [15] the capacity that I exercise as quality control manager I called together our entire quality control group and asked them to verify these times and temperatures, and they so did before I came down here.

Q. With respect to this oil-blanching process, Mr. Gheen, is any flavor imparted to the potato as well as the heat?

A. The flavor of the oil, I guess, you would say would be imparted.

Q. Would you say it is that flavor which largely distinguishes French-fried potatoes from other types?

A. That is a very vague question. In the finished product the inside of the potato is—in the finished product as the ultimate user gets it the inside of the potato is very much like a baked potato and the outside has the flavor of oil, you might say, the crust.

Q. Now, have you ever merchandised potatoes cut in the shape of French fries without the oil-blanching process? A. We have so done.

Q. You have so done. But I understand that your customers prefer the oil processing to be performed by your plant; is that correct?

A. Very much so.

Q. Does the French-fried potato have any greater or less qualities of preservation than the water-blanching vegetables?

(Testimony of Evan Gheen, Jr.)

A. It depends on the degree of water-blanching, for one thing, [16] and on the inherent qualities of the potato. In a general way, a potato which has been oil-blanching would stay out in the open air for a slightly longer time than one which had not been oil-blanching. That is part of the reason for the coating of oil, is that it helps the chef in the time element that is involved in his work.

Q. Speaking of vegetables other than the French-fried potato, do certain of these vegetables have greater density—or may I ask you this: Do all of these other vegetables have greater density than the French-fried potatoes?

A. There are variations in density, and there are variations even among potatoes. Every potato is an individual.

Q. Separately taking vegetables other than potatoes of any kind, in shipping them would you say carrots and peas have the greatest density of any of the vegetables?

A. I wouldn't say that I am technician enough to answer that question.

Q. Can you tell us whether these other vegetables move at greater or less minimums under the tariffs? Do you happen to know that?

A. They move under very similar minimums. The minimums, in a general way, that we have used have been 46,000 pounds per car or 60,000 pounds per car.

Q. Now, you indicated on direct examination that French-fried potatoes, as I heard it, are a more

(Testimony of Evan Gheen, Jr.)

valuable commodity [17] than the French-cut potatoes.

A. By two to three cents.

Q. By two to three cents. And the French cut, I understand, have not been subjected to the oil blanching?

A. That is correct.

Q. Taking the French-fried potatoes as such, in the hands of the consumer, as far as you know, it is used only as a French-fried potato; is that correct? In other words, in the course of preparation the resulting product for the one who is going to consume it is that it is identified only as a French-fried potato; it is not ordinarily adaptable for other types of cooking. For instance, would you use it in soups?

A. I don't think, by and large, that you would use it for anything else.

Q. That is right. Now, on the other hand, the other types of vegetables which have been subjected only to water-blanching might be used by the housewife for many different cooking purposes?

A. It depends on the shape of the product that is presented to them.

Q. For instance, let's take peas. Your frozen peas are used—I assume they can be boiled and served as such; is that right?

A. Correct. [18]

Q. And they can be served in salads?

A. You would cook them first, I think.

Q. You would cook them, yes, that is right. But they could be served in salads and they could be placed in stews and soups; isn't that right?

(Testimony of Evan Gheen, Jr.)

A. Yes.

Q. Does your company, Mr. Gheen, produce other frozen products such as frozen pies?

A. We manufacture no pies.

Q. You do not? A. No.

Q. You simply furnish the ingredients, the vegetables? A. That is correct.

Q. Are you familiar at all with the manner in which certain of these other frozen products, such as peas, are prepared by the consumer, or the duration of time which it takes to prepare them for the table?

A. Well, I am not too familiar with that, no.

Q. Now, on Exhibit 1, which is the label for the Bel-air French-fried potato, what process is used for the French-fried potato so packaged, and in which it is referred to on the label as cooked in pure vegetable oil? Is it the same process you have described for all of these?

A. It is the same process as I described for the oil blanching with the exception that we introduce a slight amount [19] of color to the product. In this particular case, measured by U.S.D.A. standards, the color would be gauged between 1 and 2 U.S.D.A. And in order to introduce this color there is an increase in the time of approximately 15 to 30 seconds.

Q. Now, is your product then produced more or less in accordance with the specifications of your customer? A. That is correct. They are.

Q. And I understand, then, that he specifies a

(Testimony of Evan Gheen, Jr.)

particular shade of color which you have indicated might be No. 1, No. 2 or—how far do these designations go?

A. He designates the color. A particular buyer of frozen food, they specify the color. Others do not.

Q. Will you tell us all of these specifications of color. You indicated some numbers. How many numbers are there?

A. There are a total of four numbered colors. However, there can be color above and below the four numbered ones. The colors are 1, 2, 3 and 4, in order light, medium, dark and very dark.

Q. This sort of specification is peculiar, is it not, to French-fried potatoes?

A. No, no. It is not peculiar. The same customer has defined each step in the process in other commodities as well as this one.

Q. Do you mean to say with respect to peas and carrots he will define the period of time—— [20]

A. The time and temperature that is required, yes.

Q. Now, on Exhibit No. 3, the cooking instructions, there are certain descriptive notes, as follows: "High quality potatoes have been carefully selected, peeled, washed and cut. After being fried in pure vegetable oil they are immediately quick-frozen." Now, by the use of the term "fried in pure vegetable oil" do you mean to describe the oil-blanching process which is used for all potatoes?

A. The term is applicable in the sense that the

(Testimony of Evan Gheen, Jr.)

industry and the consumer understand it in that way.

Q. What do you think the consumer understands by the word "fried"?

A. The word "French-fried" was in existence before the processed potato came along, and other processors were in business approximately for ten years before we came along in our little plant over in Ontario there, so some folks called this same product oil-blanché and some folks called it French-fried. As the housewife thinks of it, she understands in her own mind that this product has to be cooked before it is ready to eat. We understand it, also, so between us we have a common agreement about what the term means. To institutional users we oscillate in describing the product. We sometimes use the term "oil-blanché" and we sometimes use the term "French-fried," according to what the particular customer has become acquainted with. [21]

Q. Now, let me ask you this: Is this same type of label used both for the institutional customers as well as the housewife?

A. That is a retail label, used only——

Q. When you say that, are you referring to——

A. Any of those.

Q. Any of these three?

A. Any of those smaller labels are only for the housewife, sold through stores.

Q. The label for the institutional user has to carry different instructions?

(Testimony of Evan Gheen, Jr.)

A. It is not actually a label in the sense that you think of that being a label. The instructions are sometimes printed on the case, the shipping case in which the product goes forward.

Q. Incidentally, as far as these several shipments involved in this case are concerned, would it be correct to say that in practically every case, both institutional as well as the product for use by the housewife, they moved in the same shipments, or could that have been the case?

A. It could be, but there is no general rule governing that.

Q. No general rule?

A. It is just happenstance.

Q. You have indicated as far as the preparation by the [22] housewife is concerned that she could prepare this in one of two ways. One, I believe, was to dip them in deep fat; is that right?

A. Yes.

Q. Or she may bake them in the oven?

A. Yes.

Q. You testified that after three minutes, I believe the time was, the potatoes should begin to warm up. Now, did you mean to say by that statement that the potato was sufficiently heated in that time right through to the middle and ready to serve on the table?

A. No. Yesterday this very question came up. If I may, I will give you a background of it. In our own minds we were wondering how you folks would think of this, so we called the U.S.D.A. men in our

(Testimony of Evan Gheen, Jr.)

plant and asked them to take the product under question here and put it in the oven and see how many minutes it took to take the cold out of it, and then to eat it, and then to follow the instructions by submitting it to the rest of the heating time. And their answer to us was that it took between two and three minutes to take the cold out of the product so that the product was warm to the touch. The product still tasted raw in their mouth at that stage. And that it took the rest of the cooking time in order to get it cooked in readiness to eat.

Q. Of course, I understand the extent of the cooking time [23] is a matter of the taste of the housewife?

A. That is correct; very much so.

Q. Whether the potato would be firm or soft?

A. Yes.

Q. Now, Mr. Gheen, returning once again to these specifications, you have indicated the specification by color number. Now, can you give us an idea as to what times are involved there? In other words, what is the spread, the time spread?

A. The time spread is 30 seconds. We don't set about to produce anything higher than a No. 2 in color. Institutional users are predominantly zero to one, from colorless to a light color. All they want is the oil coating on there. The retail housewife—these buyers who interpret the housewife's desires say that they want something halfway between a 1 and 2 in color. To achieve a zero to one we pass it through for a period of one minute plus or minus.

(Testimony of Evan Gheen, Jr.)

To achieve a 1 to 2 color we pass it through for a period varying up to one and a half minutes.

Q. The 1 to 2 color, I assume, is the color one might ordinarily find on the potatoes as served on the table; isn't that right?

A. That is correct. It is described as a light golden color.

Mr. Roos: That is all, your Honor. [24]

Redirect Examination

Q. (By Mr. Gallagher): Just a couple of questions, Mr. Gheen. Regardless of the color, do all these French fries have to be cooked after they leave your plant?

A. Yes, they do. They require cooking.

Q. Does it take any different length of time to cook them by the housewife whether they are No. 1 color or No. 2 color?

A. No, for the reason that the color is not attributable chiefly to the oil but to the sugars that are inherent on the surface of the potato. Therefore, the housewife's cooking time is very much the same.

Q. The institutional users who want the zero to No. 1 color, as I understand, what they are after is the oil coating for the advantage that you have described?

A. That is correct.

Q. That is, less oil has to be used by the hotel or restaurant or operator?

A. That is correct. They say to us, "Let us put the color on. We know our business."

(Testimony of Evan Gheen, Jr.)

Q. They consume less of their own oil; in other words, you are selling grease and potatoes?

A. Yes.

Q. Now, on the question of labels, regardless of what you call it, whether it is described there as a French fry [25] or an oil blanch, is this the process that you go through regardless of——

A. The process is identical.

Q. You were asked about minimum rates. What is the significance of that, if any?

A. From my point of view, you mean?

Q. Yes, from your point of view.

A. I don't know what the particular significance might have been in their minds as they asked me the question. We are able to load the cars to the required capacities of 46,000 and 60,000 pounds on all the products that we pack. Therefore, it is not a limiting factor.

Q. Do you have some problem in connection with the minimum weights if you have these two classifications in one carload? In other words, if you have French fries——

A. No, the minimum weights are identical regardless of whether it is French fries or other frozen vegetables.

Q. Then do you have any other problem? If you have a half a carload of French fries and half a carload of mixed vegetables, does that create a problem?

A. The only problem that creates is that in the

(Testimony of Evan Gheen, Jr.)

difference in classification there results a difference in rate sometimes, depending on which period we are discussing. But that is a problem to us and a problem to the customer.

Q. Now, if this potato did not have an oil coating on it, [26] would the housewife be able to prepare it by putting it in the oven?

A. She could prepare it, but it wouldn't necessarily be something she would want.

Q. It would not be a desirable thing without this oil coating? A. Not in our opinion.

Q. You find that true in the trade?

A. Yes.

Q. That is why you put the oil coating on it?

A. Yes.

Q. You were asked about density. Do you know generally the density difference between a carrot and——

A. In a general sort of way the density of a potato is greater than the density of water.

Mr. Gallagher: I think that is all.

Mr. Roos: Nothing further.

(Witness excused.)

Mr. Gallagher: Your Honor, I may or may not have one other witness. If I had a couple of minutes to talk to him, then I know we will be through by noon.

The Court: Take five minutes.

(Short recess.) [27]

Mr. Gallagher: That completes our testimony in the case in chief, your Honor.

Mr. Roos: The plaintiff has no rebuttal. We rest.

The Court: I will hear you in argument now.

(The matter was argued to the Court by Counsel for the respective parties and was thereafter taken under advisement by the Court.) [28]

[Endorsed]: Filed May 15, 1957.

[Endorsed]: No. 15582. United States Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, Appellant, vs. Ore-Ida Potato Products, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 7, 1957.

Docketed: June 14, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

described in Paragraph V of the Agreed Facts as cooked foods.”

(3) The trial court erred in its Conclusion of Law No. II, which reads:

“That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.”

(4) The trial court erred in its Conclusion of Law No. III, which reads:

“That by reason of the above the defendant is entitled to recover from plaintiff as overcharges, including the Federal transportation tax on the shipments described in Paragraph IV of the above the sum of \$5,331.24.”

(5) The trial court erred in failing to conclude and hold that the potatoes, by reason of the process described in Paragraph XI of the Findings of Fact, lost their identity as raw potatoes or fresh vegetables, but are a frozen cooked food.

(6) The trial court erred in failing to conclude and hold that the process described in Paragraph XI of the Findings of Fact involves the preparation of potatoes for consumption by the action of heat and renders the product a “food cooked, cured or preserved” within the meaning of the tariffs described in Paragraphs V and VI of the Findings of Fact.

(7) The trial court erred in failing to conclude and hold that said potatoes are not properly classified as “vegetables, fresh or green” under Item

4715 of the tariff described in Paragraphs V and VII of the Findings of Fact.

(8) The trial court erred in failing to conclude and hold that by reason of the Findings of Fact I through XI inclusive the plaintiff is entitled to recover from the defendant as undercharges, including the Federal Transportation Tax, on the shipments described in Paragraph IV of the Findings of Fact the sum of Six Thousand Two Hundred Thirty-six Dollars and Eighty-six Cents (\$6,236.86) plus interest and costs.

(9) The trial court erred in failing to grant plaintiff-appellant's motion for summary judgment.

(10) If the Court finds that the language of Items 4600 and 4715 of the tariffs described in Paragraphs V and VII of the Findings of Fact was not used in its ordinary sense, and that extrinsic evidence is necessary to determine the meaning of such language in the light of trade usages and practices, then the District Court had no jurisdiction of the controversy in advance of a determination by the Interstate Commerce Commission of the effect of such language as so used.

Respectfully submitted this 14th day of June, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

Comes now appellant and designates the following portions of the record on appeal to be printed herein, which includes all of the record which either appellant or appellee deems material to the consideration of the appeal, to wit:

As Designated by Appellant by Designation of Record on Appeal Filed in the District Court:

1. Plaintiff's complaint (filed January 17, 1956).
2. Certificate of Service and Answer (filed April 9, 1956).
3. Reply to counter-claim (filed May 31, 1956).
4. Pre-trial order (filed February 13, 1957).
5. Motion for summary judgment (filed February 11, 1957).
6. Memorandum of decision (filed March 14, 1957).
7. Findings of fact and conclusions of law (filed March 18, 1957).
8. Judgment (entered March 18, 1957).
9. Notice of appeal (filed April 15, 1957).
10. Appellant's statement of points.
11. Supersedeas bond on appeal (filed April 15, 1957).
12. Appellant's designation of record on appeal.
13. Order for transmittal of exhibits.
- 13-A. Amended order for transmittal of exhibits.
14. Amendment to designation of record on appeal.

15. Appellant's supplemental statement of points.
16. Transcript of docket entries.
17. Clerk's certificate.

Exhibits four (4) and five (5).

As Designated by Appellee By Additional Designation of Record on Appeal Filed in the District Court:

12-A. Defendant's additional designation of record on appeal.

Transcript of the testimony and all proceedings had at the trial of this cause in the District Court.

Respectfully submitted this 14th day of June, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1957. Paul P. O'Brien, Clerk.

United States
Court of Appeals

For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,
Appellee.

Brief for Appellee

Appeal from the United States District Court
for the District of Oregon

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Ontario, Oregon,
Attorney for Appellee.

FILED

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United States
Court of Appeals

For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,
Appellee.

Brief for Appeller

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

The Appellant makes only two Specifications of Error and we will discuss them in the same order as discussed in their brief. The Statement of the Case, Jurisdiction, Facts, Issues and Record on Appeal are well stated by the Appellant and we take no exception to them.

SPECIFICATION OF ERROR I

Summary of Argument

1. Motion of Summary Judgment was properly refused.
2. Cardinal rules of construction are:
 - (a) Any doubt or ambiguity is to be resolved in favor of shipper.
 - (b) If two rates are equally applicable the shipper is entitled to the lower of the two.
 - (c) If there are two rates applicable, one being more specific, the specific will control over the general.
3. Comparison with Fair Labor Standards Act and Motor Transport Act.
4. Substantial identity.
5. Killing enzymes is not cooking.
6. Comparison of french fries with other products of Appellee.
7. Definition of words under Tariff Item 4600 and 4715.

AUTHORITIES

- United States vs. Strickland Transp. Co., Inc.*
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- Willingham vs. Seligman*, 179 Fed. (2) 257
- U. S. vs. Gulf Refining Co.*, 69 L. E. 1082
- Buch Express vs. United States*, 132 Fed. Sup.
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- West Coast Products Corp. vs. Southern Pacific Co.*, 226 Fed. (2) 830

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ARGUMENT

Motion of Summary Judgment was properly refused

This Specification deals with the refusal of the Court to grant Appellant's Motion for Summary Judgment. The most obvious answer to this is the fact that the Court did not feel that the plaintiff was entitled to judgment, either summary or otherwise. It is a Motion for Summary Judgment in favor of the plaintiff and if the merits did not warrant a judgment for plaintiff such Motion was properly denied. We will discuss the merits further along in the brief. The authorities set out under this first Specification on pages 8, 9 and 10, state the general law relative to the duty of the Court to construe the tariff. However, the fact that the construction of a

tariff is a matter of law does not indicate the issues are to be determined on a motion for summary judgment. The Appellant did not submit any testimony and therefore all the facts are conceded and it became a question of law based upon the testimony and pre-Trial Order for determination by the Court. The testimony that was submitted was simply in amplification and further explanation of the facts set out in the Pre-Trial Order. It was not introduced for the purpose of introducing expert testimony nor to prove any peculiar uses in a trade or locality.

Cardinal Rules of construction.

United States vs. Strickland Transp. Co., Inc., 200 Fed. (2) 234 at 235:

“We think this is so, too, because, if it be considered that the shipment could come under either of the two classifications, the shipper was entitled to the ‘Machinery or Machines’ classification because the rate prescribed by it is the lower. * * * If it could be considered that there is an ambiguity in the tariff and is not made clear under which rating the articles shipped come, the ambiguity must be resolved in favor of the shipper, and the lower rate must be awarded to him.”

Willingham vs. Seligman, 179 Fed. (2) 257 at 258:

“In general there is nothing peculiar about the canons of construction in dealing with freight tariffs. They are interpreted in much the same way as contracts and statutes. Where general and specific provisions overlap, the specific is deemed to be an exception to the general rule.

Ambiguities are resolved against the carrier and in favor of the shipper. The shipper is entitled to the lowest published rate properly covering his tendered shipment."

U. S. vs. Gulf Refining Co., 69 L. E. 1082 at 1085:

"Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. (citing) And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates. (citing) It follows that, if the property in question properly might have been described either as gasoline or as unrefined naptha, the lower grade was lawfully applied, and defendant was not guilty. And the burden was on the United States to prove beyond a reasonable doubt that the property so shipped was gasoline, and was not unrefined naptha."

Buch Express vs. United States, 132 Fed. Sup. 473 at 476:

"Even were the two descriptions and tariffs equally appropriate, the shipper is entitled to have applied the one specifying the lower rates." (citing)

West Coast Products Corp. vs. Southern Pacific Co., 226 Fed. (2) 830 at 832:

"Unquestionably, if the shipment could be included in more than one tariff designation, it would be proper to select the item more specifically applicable to the product being transported. If there were two tariff descriptions equally ap-

propriate, West Coast, as shipper, would be entitled to the lower rate."

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co., 133 Fed. Sup. 680 at 702:

"It seems to be the law that where a commodity is included in more than one tariff designation, that which is more specific will be held applicable."

Motor Cargo vs. United States, 124 Fed. Sup. 370 at 371:

"Frequently the tariffs filed with the Interstate Commerce Commission do not specifically describe the article carried, but the rule is that the classification which comes nearest to a description of the article carried determines the rate to be collected, if it can fairly be said that the article comes within that classification. (citing) Gun controls or power drives are not specifically named in any tariff filed by the carrier with the Interstate Commerce Commission."

Louisville & N. R. Co. vs. United States, 109 Fed. Sup. 464 at 467:

"Where two or more classifications appear to be equally applicable, the shipper is entitled to have applied the lower classification. (citing)"

Atchison, Topeka & Santa Fe Ry. Co. vs. Simpson, 109 Fed. Sup. 616 at 617:

"The shipper contends that where two provisions

of a tariff are equally appropriate it is entitled to have applied the one specifying the lower rate. The parties also differ as to whether there is an ambiguity in the published tariffs, the shipper relying upon the rule that in the event of ambiguity the doubts are to be resolved in its favor while the carrier, although recognizing the rule, says it is inapplicable."

As applied to this case, if there is any doubt in the mind of the trier of the facts as to whether french fried potatoes are cooked food or frozen vegetables, those doubts should be resolved in favor of the shipper. We are dealing with a product here to which heat has been applied but there is very serious question as to whether this application of heat cooks the potato. This doubt likewise should be resolved in favor of the shipper.

We do not concede that Item 4600 is in any way appropriate for french fried potatoes. On the other hand if the Court felt that it did apply, then it is even more clear that Item 4715 also applies. There can be no question but what a french fried potato is a vegetable, nor that it is a fresh vegetable, and there can be no doubt that it is frozen. The french fried potato fits every word contained in the description under Item 4715. Therefore, if it could be considered as coming under both of the classifications, the Appellee is entitled to Item 4715, that being the lower of the two rates.

Again if we concede for the purpose of argument,

that french fried potatoes are properly classified under Item 4600 as well as Item 4715, then under the above authorities Item 4715 is the proper classification for the reason it is more specific than Item 4600. The latter classification includes all kinds of cooked food as well as cured foods or preserved foods which are frozen. It would cover a great volume of articles which in the present day market are cooked and frozen. On the other hand Item 4715 is much more specific, it is limited to vegetables. It could not be applicable to meat, poultry, fish, pies, dinners or ice cream. It is limited strictly to vegetables. Vegetables is of course much more specific than food. Food is the general term which of course includes vegetables but vegetables is a more specific designation of a type of food.

Comparison with Fair Labor Standards Act and Motor Transport Act.

There is a close similarity between the question under consideration and the questions which have arisen under the Fair Labor Standards Act. There is also a close similarity between this case and cases arising under the Motor Transport Act. We will discuss the cases under these two items. Under the Fair Labor Standards Act there were certain exemptions by reason of first processing of agricultural commodities. First processing is usually those first things that are done to vegetables in preparing them for

market. Generally, it is the process of preparing or preserving the fresh vegetable for market. If a product were cooked it would include more than first processing. Stated otherwise, cooking goes over and beyond what the courts have determined to be first processing.

McComb vs. Hunt Foods, 167 Fed. (2) 905 at 907:

“Was appellee engaged in ‘first processing’ within the meaning of the statute? The word ‘process’ by definition means a series of acts, and the test of when ‘first processing’ ends is obviously not when the first act performed upon the fruit is done (it might well be first processed’ by a preliminary washing of the apples if this view was sound). A more rational view suggests the conclusion that the sum of several operations may well constitute a ‘process’ or ‘processing’. The cutting and peeling admittedly does not end the first processing of the major part of the apple which is later dehydrated, yet appellant maintains that the first processing (so far as the peels and cores are concerned) has ended at this point, while these parts of the apples have in fact not yet been ‘processed’ in any manner and have yet to be converted into juice or pomace. This argument does not appeal to us.”

Hendricks vs. DiGiorgio Fruit Co., 49 Fed. Sup. 573: (575)

“If ‘first processing’ does not mean the processing that first results in a marketable product, where is the line to be drawn? It is true that the wine or brandy making process may be broken down

into component processes or operations, and that these, in turn, may be broken down still further. But the same thing is true of any other process, as, for example, the production of dried and frozen fruits and vegetables, condensed, evaporated and dried milk, butter, cheese, dried eggs, and flour, all of which, the Administration has held, fall within the exemption. Obviously, first processing does not end at some arbitrarily chosen point in the midst of the wine or brandy making process, any more than it ends at such a point in the cheese making process. The stipulated facts show that when the crushing season starts defendant's operations are a continuous processing of the fresh grapes that cannot be halted at any point prior to completion. To choose one of the early steps in such continuous process and say this and no more constitutes first processing would be arbitrary and unwarranted."

In *Mitchell vs. Oregon Frozen Foods Company*, 145 Fed. Sup. 157, it was conceded by the Government that these same french fried potatoes were included in "first processing". The exception involved was Section 213 (a) (10) of the Fair Labor Standards Act of 1938, 29 USCA 201 et seq.

"Any individual * * * engaged in * * * preparing in their raw or natural state * * * agricultural or horticultural commodities for market."

If the potatoes were being "prepared in their raw or natural state" they certainly were not a "cooked food."

The Oregon Frozen Foods Case is, however, presently on appeal, but this point is not involved in the appeal, as the Government conceded that these french fried potatoes were exempt under this "first processing" clause.

Substantial Identity

The controlling factor in the question is whether or not a product loses its substantial identity in the process. In other words, is the product substantially the same product that it was at the beginning. Otherwise stated, does the product change from the original product into some different product?

In *East Texas Motor Freight Lines vs. Frozen Food Express*, 100 L. ed. 917 the Court dealt with "substantial identity" saying: (924 L. ed. cit.)

"A chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a 'manufactured' commodity.

At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of §203 (b) (6)."

This was followed in *Home Transfer & Storage Co.*

vs. United States, 141 Fed. Sup. 599, which included the same general process that we are dealing with here. The Court said: (602)

“The processing of fresh fruits for quick freezing in this case is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. Nothing but slicing of the fruit affects its physical form. The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing. Although this process may produce noticeable discoloration, or may divide a stalky variety into two or more parts, nothing is done to otherwise change the form of the vegetables. In other respects than those mentioned, these processed fruits and vegetables remain essentially in the same shape and form as non-processed fruits and vegetables.

Such results of the processing here make applicable to the facts of this case the above quoted Supreme Court statement in its April 23, 1956 decision that:

‘But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been ‘manufactured’ within the meaning of §203 (b) (6).’ ”

Counsel cite the case before the Interstate Commerce Commission of *W. W. Hughes Extension-Frozen Foods*, M.C. 105783 Sub. (3) wherein the Com-

mission held certain items to be manufactured. The list includes frozen french fried potatoes, frozen eggs, frozen egg yolks, etc.

However, the last expression of any court on this question that we have discovered is *Frozen Food Express vs. United States*, 148 Fed. Sup. 399 (Dec. 1956). That was an action to restrain the Commission from enforcing its report defining certain items being manufactured. The list included among others frozen whole eggs, dried egg powder, dried egg yolks, fruits and vegetables (quick frozen). In holding the items we enumerate along with many others as not being manufactured, the court said at page 402-3:

“Our holding that fresh and frozen dressed poultry was exempt was affirmed, 351 U. S. 49, 76 S. Ct. 574, 577, wherein the Supreme Court announced the so-called ‘continuing substantial identity’ test, quoting from *Anheuser-Busch Brewing Ass’n v. U.S.* 207 U.S. 556, at page 562, 28 S. Ct. 204, 52 L. Ed. 336:

“ * * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012. There must be transformation; a new and different article must emerge, ‘having a distinctive name, character, or use.’”

* * *

“With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packed, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scari-fied; redried tobacco leaves.”

Those items that do lose their continuing substantial identity were: Commercial creamery products including cottage cheese, cream cheese and butter; cottonseed meal, canned fruits and vegetables, condensed milk.

Butter, cream cheese and cottage cheese cannot be identified as milk but frozen french fried potatoes certainly can be identified as potatoes.

A frozen french fry is identified as the original product, it has acquired no new “identity” has no “new properties” and is not devoted to any or different uses than its original principal ingredient. If these potatoes were converted or manufactured into

potato starch, or if the corn was made into corn-starch, then they would lose their substantial identity. But here we have a potato that is sliced, blanched (to kill enzymes) and frozen and as such retains its substantial identity.

Killing enzymes is not cooking.

Water blanching for a minute and one-half is not sufficient to kill the enzymes and it is necessary to blanch them in water longer or to blanch them in oil to kill the enzymes. Paragraph XI of the Pre-Trial Order states that the purpose of oil blanching "was to kill the enzymes in the raw potato and to stop bacterial decay." (R. 13 and 14) Mr. Gheen testified "The purpose of blanching is to inactivate the enzymes" (R. 34) and "the only other purpose would be to coat the product with oil." (R. 35)

Comparison of french fries with other products of Appellee.

It is interesting to note that all other vegetables processed at Appellee's plant are classified under Item 4715 of the tariff. (R. 40) They include corn, carrots, lima beans, string beans, and potatoes in various forms, i.e., french cuts, potato patties, diced potatoes. (R. 40 and 34)

They all go through the same general processing. (R. 33) The only difference is the time of blanching and the medium. Some vegetables take a longer time than

others. Where oil is used as a blanching agent the water blanch timing is shortened.

Definition of words under Tariff Item 4600 and 4715.

Appellant quotes Webster's New International Dictionary for a definition of "cook".

"Made suitable for eating." (Ap. Br. 11)

The testimony is: "This product, if you took a package out and simply thawed it out to get rid of the freezing would it be a palatable product? A Well, yes and not. You could swallow it, but it is not healthy so to do." (R. 36) Certainly it would not be "suitable for eating."

As to "curing" the same dictionary says to preserve by drying, salting, etc. (Ap. Br. 12) It takes no citation of authorities to establish that these french fried potatoes are not "cured". This would apply to salt pork, jerked venison or smoked hams or bacon.

As to "preserve" the dictionary says: "To save from decomposition by freezing." By definition frozen vegetables come under Item 4715 so that portion of the definition is not indicative of Item 4600. The balance of the definition is "curing or treating with a preservative."

"Curing" already is eliminated under the above and there is no testimony that any "preservative" is added to the potatoes.

The oil blanch is not a preservative and is not used for that purpose. Its purpose is to kill the enzymes

and to furnish the oil that expedites the cooking of the potatoes when the user receives them. It avoids the necessity of adding oil if baked in the oven and cuts down on the oil required in the deep fat fryer of the housewife or restaurant cook.

Under Webster's definition these potatoes are neither "made suitable for eating", "cured", or "preserved".

Turning now to the language of Item 4715 first the product is a vegetable. It is either cooked or it is fresh. All other vegetables processed by Appellee are classified as frozen fresh vegetables. If a frozen french cut is a frozen fresh vegetable and that is admitted, then a frozen french fry is a fresh vegetable. The french cut is not cooked and the housewife follows the same cooking instructions if the deep fat fry method is used. If the oven method is used, the first two or three minutes is necessary to defrost and warm the potato, the rest of the 10 to 25 minutes is for cooking the potato. (R. 36)

Comparing the cooking time of the oil blanched potato with other frozen products shipped under Item 4715 we find mixed vegetables require 15 to 18 minutes, the potato patty from 10 to 25 minutes, kernel corn 6 to 8 minutes. Obviously the frozen oil blanches, or what is commonly called french fry, must be cooked by the housewife before it is made "suitable for eating" or before it is "cooked". If it is not a "cooked food" it cannot be classified under Item 4600.

Appellant attempts to limit the significance of the cases dealing with "raw or natural state" by stating that the reasons for those rulings are not present in this case. This is answered by the long line of cases establishing the preferred position of the shipper as against the carrier, i.e., shipper entitled to the lower of two equally applicable rates, doubts or ambiguities resolved in favor of shipper, the more specific rate controls the more general. We also feel that farm products should command a lower rate than "cooked foods". All the reasons set forth in the Fair Labor Standards cases and the Motor Freight cases apply with a particular vigor here. Why should oil blanched potatoes be required to bear a higher rate than other products handled in the same identical manner by the carrier? There is no logical distinction.

SPECIFICATION OF ERROR II

Summary of Argument

1. Invoking the doctrine of primary jurisdiction is discretionary.
2. Where there is no dispute as to the facts there is no occasion to invoke the doctrine.
3. Where there is no trade term or technical language used there is no occasion to invoke the doctrine.
4. The admission of testimony ipso facto does not require or indicate that the doctrine be invoked.

5. Interstate Commerce Commission possesses no better means, method, or knowledge to determine the question than the Court does.

6. Many courts have dealt directly with much more complicated and technical questions than are presented here and decided the issue without invoking the doctrine.

AUTHORITIES

Texas & P. R. Co. vs. Abilene Cotton Oil Co.
(1906) 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553.

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co. 133 Fed. Sup. 680.

Great Northern R. Co. vs. Merchants Elevator Co. (1922) 259 U. S. 285 (290, 291, 292) 66 L. E. 943

United States vs. Western P. R. Co., 1 L. Ed. (2) 126 (Vol. 1 U. S. Adv. Sh. Dec. 17, 1956)

United States vs. Chesapeake and Ohio R. Co. 352 U.S. 1 L. Ed. (2) 140 (Adv. Sh.) 77 S. Ct.

Norge Corp. v. Long Island R. Co., 77 Fed. (2) 312

ARGUMENT

This specification involves the question of whether or not this is an appropriate case to invoke the doctrine of primary jurisdiction.

Otherwise stated, is there such a controversy over the facts, or is the question so highly technical, that it would be advisable to refer the question to the Interstate Commerce Commission for examination,

hearing, and determination. Or, should the trial court hear the cause in the first instance and make its own determination.

The doctrine had its genesis is *Texas & P. R. Co. vs. Abilene Cotton Oil Co.* (1906) 204 U. S. 426, 27 St. Ct. 350, 51 L. Ed. 553.

It was an action in a state court to recover alleged overcharges on the ground the charges were excessive, unreasonable and unjust. The rates had been published under the provisions of the Interstate Commerce Act. Mr. Justice White said: (p. 562 L. Ed)

“Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.”

It has been cited, followed and distinguished in a great number of cases since 1906 down to 1954 in *Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co.*, 133 Fed. Sup. 680, where the court referring to *Texas & P. R. Co. vs. Abilene Cotton Oil Co.* said at page 690:

“The court in that case established the so-called ‘primary jurisdiction’ doctrine, which has been referred to as an excellent example of judicial

legislation (Davis on Administrative Law, page 665, 1951), holding that a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the Act and had not been found to be unreasonable by the Interstate Commerce Commission."

Great Northern R. Co. vs. Merchants Elevator Co. (1922) 259 U. S. 285, 291, 292. In a suit to recover alleged overcharges Mr. Justice Brandies in speaking of the necessity of invoking the doctrine of primary jurisdiction said: (66 L. Ed. 946)

"This argument (for uniformity) is unsound.

* * *

Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. * * *

Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to

be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

And at page 948:

"In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

These cases reveal that the use of the doctrine is discretionary and only when it serves a good purpose. It certainly is not mandatory or it would necessarily be used in all similar cases. *United States vs. Western P. R. Co.*, 1 L. Ed. (2) 126 at 135: (Vol. 1 U. S. Ad. Sh. Dec. 17, 1956)

"By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in *Great Northern R. Co. vs. Merchants Elevator Co.* (US) *supra*, which call for decision based on the particular facts of each case."

As appellant points out in a number of instances there is no dispute as to the facts. The railroad did not introduce any rebuttal testimony and all testimony stands undenied. Under such circumstances it is the province of the court to interpret the language of the tariff as it would the language of any statute.

There seems to be some implication that if no testimony is received then the doctrine of primary jurisdiction is not appropriate but if any testimony is introduced it immediately becomes necessary to suspend the trial and refer the matter to the Interstate Commerce Commission. We do not so read the cases. It is only where there are contested issues of fact, highly technical matters of science or rate making, or the peculiar usages of trade or locality that the doctrine is invoked. Certainly none of these elements were present in the case under consideration.

The short testimony here was of the same nature as was introduced in *West Coast Products Corp. vs. Southern Pacific*, 226 Fed. (2) 830 (9th Circuit May, 1955). That also was an action by the railroad to recover claimed additional freight charges. It involved simply the question of which of two items of a freight tariff was applicable to the shipment of certain olives. The testimony was all uncontradicted and described the method of processing the olives. The court did not invoke the doctrine but decided it as a matter of law after withdrawing the issue from

the jury. The similarity between these two cases is striking.

United States vs. Western Pac. R. Co. 77 S. Ct. 161, 1 L. Ed. (2) 126. This is a striking example of where the doctrine should be applied and where it should not be applied. There is a vast difference between an incendiary bomb and a potato. None of the intricate questions involved there are present in this case. This case presents only questions of common ordinary everyday matters. It does not require a body of experts in transportation to determine when a potato is cooked. Every housewife in the land knows that.

The Court said: (132)

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”

In the very recent case of *U. S. vs. Chesapeake & Ohio R. Co.*, 352, U. S., 1 L. Ed. (2) 140 (Adv. Sh.) 77 S. Ct. which was decided the same day as the *Western Pacific* case, 1 L. Ed. (2) 126 the court said at p. 142 of the L. Ed. Cit.

“Hence we face the same question as the one we have dealt with in the *Western Pacific Case*, supra, namely: Does the issue of tariff construc-

tion, which the Court of Appeals regarded as one for the court, involve such acquaintance with rate-making and transportation factors as to make the issue initially one for the Interstate Commerce Commission, under the doctrine of primary jurisdiction?"

We submit that the factors there involved are not here, i.e., "such acquaintance with rate making and transportation factors." Our sole question is to determine whether the potatoes are "cooked food" or "vegetables, fresh, frozen."

As pointed out in Appellant's brief the courts have dealt with other situations involving much more complicated and technical items than we are dealing with here, without invoking the doctrine of primary jurisdiction. (App. Br. 28-29)

In the *Norge Corp. vs. Long Island R. Co.* case, 77 Fed. (2) 312, cited by Appellant, the court also said at p. 314:

"It is only where words of the tariff have an ordinary meaning only, and are employed in that sense so that their interpretation is solely a question of law, involving no issue of fact, that a court has jurisdiction in the first instance. (citing)

In *Great Northern Ry. Co. vs. Merchants' Elevator Co.*, supra, the court held that if the construction of the tariff presented solely a question of law, the court had jurisdiction, but if it involved a question of fact or of discretion in technical matters, the Commission had exclusive jurisdiction."

We wish to emphasize, what so many courts say, "where there is no issue of facts to be determined" there is no need to refer the matter to the Interstate Commerce Commission.

CONCLUSION

We respectfully submit that the trial court's judgment should be sustained for the reason that its Findings of Fact are well supported by satisfactory evidence, and that they should not be reversed except for clear showing of error, that the Findings entered are clear and convincing and the only logical conclusion to be drawn from the Agreed Facts and the amplifying testimony. That this is not an appropriate case to invoke the doctrine of primary jurisdiction for the reason we are dealing with a common, ordinary commodity and the Court will take judicial notice of the nature and use of the product. The most compelling reason is the fact that these potatoes must be cooked before they are served by the housewife or the institutional user.

We believe the evidence, the facts, and the law are clear in this case and following the authorities cited the judgment should be affirmed.

Respectfully submitted,
MARTIN P. GALLAGHER,
Attorney for Appellee.

No. 15582

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Brief for Appellant

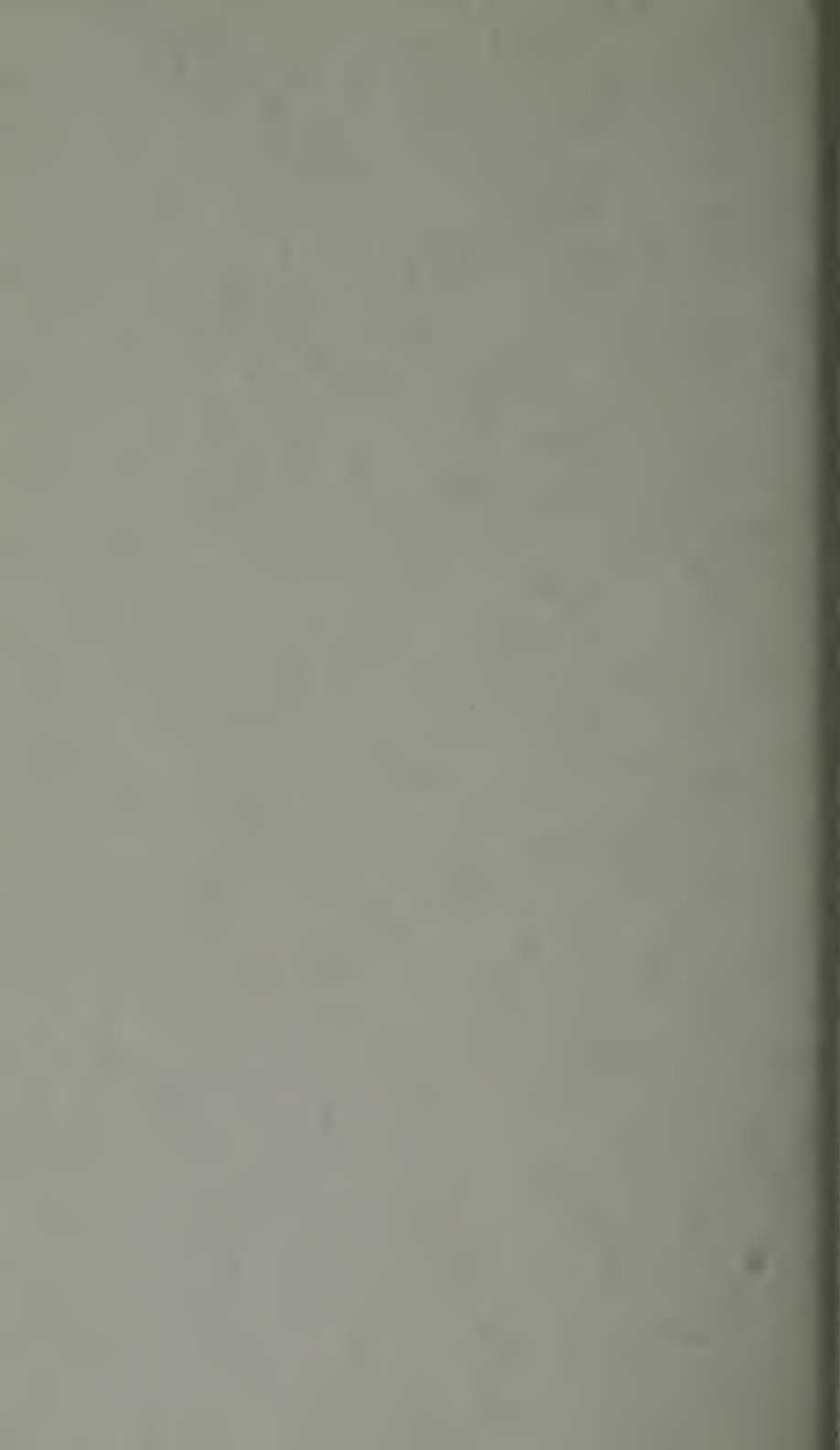
Appeal from the United States District Court
for the District of Oregon

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No. 15582

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Brief for Appellant

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

This action was brought by the Union Pacific Railroad Company to recover from Ore-Ida Potato Products, Inc., undercharges on shipments of frozen french fried potatoes transported in interstate commerce by the rail lines of plaintiff and connecting carriers. The amount sought to be recovered, as stated in the Pre-Trial Order is \$6,236.86 (R. 14). The defendant counterclaimed for overcharges on similar shipments in the amount of \$5,331.24, as shown in the Pre-Trial Order (R. 15).

Upon the trial, the issues were submitted to the Court without a jury, the Court having reserved his ruling on plaintiff's motion for summary judgment. The Court, after hearing oral testimony on behalf of defendant, over plaintiff's objection, made Findings of Fact and Conclusions of Law and entered judgment on March 18, 1957 in favor of defendant (R. 22). Notice of Appeal was filed April 15, 1957 (R. 23).

Jurisdiction

Jurisdiction is predicated upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U.S.C.A., Title 49, Chapters 1 and 2), and acts amendatory thereof and supplemental thereto (R. 10-17). The jurisdiction of this Court to review the judgment is based upon 28 U.S.C., § 1291.

The Facts

The Agreed Facts in the Pre-Trial Order (R. 10-14) reveal that between January 6, 1954 and October 2, 1955, the defendant delivered to plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 shipments of frozen French fried potatoes, with directions that each of such shipments be transported by the rail lines of plaintiff and connecting carriers to destinations in the Eastern, Middle Western and Southern districts of the United

States. The shipments were accordingly transported and delivered to the consignees designated by defendant (R-11, 12).

The applicable freight tariff is a general commodity freight tariff, Item 4600 (Part 3) of which prescribed carload rates on "food cooked, cured, or preserved, frozen NOIBN in containers in boxes." (The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed By Name.") (R. 12; Def. Ex. 2). Item 4715 of said tariff prescribed carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables, either sweetened or not sweetened), in packages as prescribed in Western Classification (Subject to Notes 1 and 6)." (Said Notes 1 and 6 do not affect the issues in this case.) (R. 12; Def. Ex. 1) The Item 4600 rates were higher than the Item 4715 rates.

On certain of the shipments of French fried potatoes plaintiff collected the Item 4715 rates instead of the higher Item 4600 rates. This gave rise to plaintiff's undercharge claim of \$6,236.86 (R. 14). On certain of the shipments, plaintiff collected the Item 4600 rates. This gave rise to defendant's counterclaim for overcharges in the amount of \$5,331.24 (R. 15).

As stated in Paragraph XI of the Pre-trial Order (R. 13) the frozen French fried potatoes had undergone the following handling and processing after harvesting:

“The potatoes referred to above were hauled from farmers’ fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

“The oil blanching consisted of immersing the sliced potatoes in blanching oil at 350°F for one and one-half minutes. They were partially browned by the oil blanching. They were cooled and quick-frozen to a temperature of -15° to -20°F, packaged, labeled, and stored in zero storage. They were shipped in refrigerated cars of the plaintiff. The purpose of blanching was to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing was to prevent spoilage and to preserve potatoes in a fresh condition.”

The foregoing Agreed Facts were incorporated in substantially the same language, in the Findings of Fact entered upon the Trial Court’s decision (R. 17-21).

The Issues

The underlying issue of the case is very simply defined in the Pre-Trial Order as:

“Were the potatoes which constitute the shipments described in Paragraph IV of the Agreed Facts ‘food cooked’ as classified in Item 4600 of the tariffs described in Paragraph V of the Agreed Facts, or were said potatoes ‘vegetables, fresh’ as classified in Item 4715 of said tariffs.” (R. 15)

A secondary issue arises by reason of the Trial Court's admission in the record of oral evidence and exhibits extrinsic to both the Agreed Facts and the tariff. Throughout the trial, plaintiff took the position that there was presented only a question of law, and that no oral testimony was warranted (R. 31, 54). The Court, however, admitted in evidence the oral testimony of defendant's witness, and also defendant's Exhibits 1, 2 and 3, which consisted of sample labels in which the packaged French fried potatoes were wrapped (R. 30-54).

The Record on Appeal

Consistent with its legal position, appellant omitted from its designation of the record the transcript of testimony before the trial court, as well as defendant's Exhibits 1, 2 and 3. Such proceedings, however, were included in the record by virtue of appellee's additional designation of the record (R. 58, 59).

SPECIFICATIONS OF ERROR

The specifications of error to be discussed are set forth in the Statement of Points on Which Appellant Intends to Rely (R. 55-57). For purposes of argument, the following grouping is indicated in relation to the two issues discussed above:

I.

The Trial Court erred:

(a) In refusing to grant plaintiff's Motion for Summary Judgment (R. 57).

(b) In its Finding of Fact that the potatoes did not lose their substantial identity by the processing described and were frozen fresh vegetables, not a frozen cooked food; and in failing to conclude that the frozen French fried potatoes by reason of the processing described lost their identity as raw potatoes or fresh vegetables, but were a frozen cooked food (R. 55, 56).

(c) In its Conclusion of Law that the process described involved the preservation of potatoes by blanching and freezing; that the potatoes were not cooked; that they should not be properly classified under tariff Item 4600; and in failing to conclude that the process described involved the preparation of potatoes for consumption by the action of heat and rendered the product "a food cooked, cured or preserved" within the meaning of tariff Item 4600 (R. 55, 56).

(d) In its Conclusion of Law that the French fried potatoes were properly classified as frozen vegetables under tariff Item 4715; and in failing to conclude that the frozen French fried potatoes were not properly classified as "vegetables, fresh or green" within the meaning of tariff Item 4715 (R. 56).

II.

The Trial Court erred in admitting as evidence in the record the oral testimony of defendant's witness and defendant's Exhibits 1, 2 and 3 (R. 30-54).

SPECIFICATION OF ERROR I

Summary of Argument

1. If the words of a tariff are used in their ordinary sense, their construction presents solely a question of law.

2. The language of a tariff must be read fairly and reasonably in the light of every word, clause and sentence, each according to its ordinary meaning.

3. The commodities embraced by Item 4600 ("cooked" food) are those which are not in their raw and natural state, even though they may not have been completely processed for human consumption.

4. The commodities embraced by Item 4715 ("fresh or green" vegetables) are those which are readily identifiable as being in their raw and natural state, and adaptable to purposes common to the raw product.

5. The frozen French fried potatoes are a "food, cooked, cured or preserved, frozen" and are properly classified under Item 4600.

Argument

The essential facts having been agreed upon, the Court is concerned solely with the application of the plain, unambiguous language of the tariff to the commodity in question.

1. *A Legal Issue*

In *Great Northern Ry. Co. vs. Merchants Elevator Co.*, (1922) 259, U.S. 285, the United States Supreme Court said (p. 290):

“Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law.”

And likening a tariff to any other document, said (p. 291):

“But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

“When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law.”

It concluded (p. 294):

“Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts.”

In *Pennsylvania R. Co. vs. Fox & London*, (1938) 93 F.2d 669, the Court said (pp. 670, 671):

“And, moreover, where the terms of the published tariff are themselves unambiguous, the

issue must be resolved by reference to the rate published, treating it as established law like any plain statute, leaving only the incidental issue of applicability which is dependent only upon the fact of the nature of the commodity shipped. Properly speaking, no construction of a tariff is involved where the only controversy is whether the commodity shipped is one or another of two things plainly classified. That was the real issue here, and, because that is so, much of the argument as to tariff construction generally is beside the point."

In *United States vs. Missouri-Kansas-Texas R. Co.*, (1952) 194 F.2d 777, the Court observed (p. 778):

"The construction of a printed railroad tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute."

and having stated its interpretation, said at page 779:

"This is the clear, unambiguous meaning of the words used in the tariff and is alone the intention to which the law gives effect."

In *Reading Company vs. Penn Paper And Stock Co.*, (1955) 134 F. Supp. 239, the Court said (p. 242):

"There is no dispute as to the facts, no question as to the exercise of administrative discretion, but merely one of construction as to which rates applied to this particular shipment. Under such circumstances it has been held that this Court

can decide the issue. *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 6 Cir., 1936, 82 F.2d 94; *Louisville & N. R. Co. v. United States*, D.C.W.D. Ky. 1952, 106 F.Supp. 999; *American Ry. Express Co. v. Price Bros.*, 5 Cir., 1931, 54 F.2d 67."

Stated in another way, the Court in *Northwestern Auto Parts Co. vs. Chicago, B. & Q. R. Co.*, (1956) 139 F. Supp. 521, said (p. 523):

"The sole issue is as to the nature of the material shipped for rate purposes. This is the only issue the court is empowered to decide. See *Sonken-Galamba Corp. v. Union Pac. R. Co.*, 10 Cir., 1944, 145 F.2d 808."

See also *Black vs. Southern Pac. Co.*, (1918) 88 Or. 533.

2. Fair and Reasonable Construction

In *United States vs. M.K.T. Ry. Co.*, supra (194 F.2d 777), the Court said (pp. 778, 779):

"The four corners of the instrument must be visualized and all the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence therein contained. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers. But claimed ambiguities or doubts as to the meaning of a rate tariff must have a

substantial basis in the light of the ordinary meaning of the words used and not a mere arguable basis. *Hohenberg v. Louisville & N. R. Co.*, 5 Cir., 46 F.2d 952; *Christensen v. Northern Pac. Ry. Co.*, 8 Cir., 184 F.2d 534; *Norvell-Wilder Supply Co. v. Beaumont, Sour Lake & Western Railway Company*, 274 ICC 547.”

In *Western Grain Co. vs. St. Louis-San Francisco Ry. Co.*, (1932) 56 F.2d 160, the Court said (p. 161): “Further, tariffs having as they do the effect of law, the language in them must be construed fairly and reasonably, in accordance with the meaning of the words used, and not distorted or extended by forced or strained construction.”

Cited with approval in *Great Northern Ry. Co. vs. Armour & Co.*, (1939) 26 F. Supp. 964, 967.

See also *Carnegie Steel Company vs. Baltimore & Ohio Railroad Company*, (1928) 144 ICC 509, 510.

3. Item 4600 Controls

The description of the commodities embraced by the relevant portion in Part 3 of this item is “food, cooked, cured or preserved, frozen.”

The word “cook” is defined in Webster’s New International Dictionary, 2nd Edition, as:

“1. To prepare (food) by boiling, roasting, baking, broiling, etc.; to make suitable for eating, by the agency of fire or heat; hence, in technical processes, to prepare or treat by, or as by, similar action of heat.”

In *The Caterina Gerolimich* (1930), 43 F.2d 248, 251, the Court noted the connotation of “cooked” in relation to onions which had spoiled in the hold of a ship, as “meaning heated to the cooking point by exterior forces.”

Reference to other words or phrases in a tariff is appropriate in determining the meaning of the word in question. (*Carpenter vs. Texas & New Orleans R. Co.*, 89 F.2d 274; *Harrison Eng. & Const. Corp. vs. Atchison, T & S. F. Ry. Co.*, 78 F. Supp. 906; *Black vs. Southern Pac. Co.*, supra (88 Or. 533).)

We accordingly turn to the word “cure” and find it defined in Webster’s New International Dictionary, 2nd Edition, as:

“3. To prepare for keeping or use; to preserve as by drying, salting, etc.; as, to cure fish; to cure hay, tobacco.”

As used in the meat packing industry, the term “curing” has been defined in *Commonwealth vs. Clark*, 25 At.2d 143, as the treating of meat with “salt, smoke, etc.” and the Court held that merely placing it under refrigeration does not change its character as “fresh” meat.

The term “preserve” in the context here used is defined in Webster’s New International Dictionary, 2nd Edition, as:

“2.a. To save from decomposition, as by refrigeration, curing, or treating with a preservative;

as to preserve specimens or skins to be stuffed; to preserve milk indefinitely.”

Judicial definitions of the words in this tariff are meager, probably because they are words of common usage and their meaning well known. However, if we consider the term “cooked” in conjunction with the terms “cured” and “preserved”, we find the implication of a permanent change in character of the food from its raw state. The food has been in preparation for human consumption, but such preparation need not be completed. The preparation, however, must have progressed beyond the stage where the food is still identifiable as being in its raw and natural state. The process admittedly must have gone beyond water blanching and freezing, which do not change the appearance or limit the variety of uses of the raw product.

Following the rule of construction stated in *United States vs. M.K.T. Ry. Co.*, supra (194 F.2d 777) that “the four corners of the instrument must be visualized,” we turn to other provisions of Item 4600 which are shown on defendant’s Exhibit 1. Part 2 includes commodities described as follows:

“Pies, fish, meat or poultry, cooked, cured or preserved, with vegetable ingredients and seasoning, *with unbaked pie crust*, frozen solid, in inner containers in boxes.”*

*All emphasis in quoted matter in this brief are ours unless otherwise indicated.

and:

“Vegetables, with or without meat ingredients, cooked, frozen solid in inner containers in boxes.”

The commodities included in this Part move at higher minimum weights than those in Part 3. Other commodities included in Part 3 are:

“Pies, fish, meat or poultry, cooked, cured or preserved, with vegetable ingredients and seasoning, *with unbaked pie crust*, frozen solid, in inner containers in boxes.”

The significant feature of these references is the character of the commodities as cooked foods; but, as indicated in italics, they need not be completely cooked, ready for consumption.

4. Item 4715 Not Applicable

The description of the commodities embraced by the relevant portion of this item is

“Vegetables, fresh or green, cold pack (frozen fresh or green vegetables, either sweetened or not sweetened) in packages.”

The term “fresh” is defined in Webster’s New International Dictionary, 2nd Edition, as:

“1. Newly produced, gathered, or made; hence, not stored or preserved, as by pickling in salt or vinegar, refrigeration, etc.; as, *fresh* vegetables, fruit, etc.; *fresh* tea, raisins, etc.

“7. Having its original qualities unimpaired.”

The term "green" is defined in Webster's New International Dictionary, 2nd Edition, as:

"6. Grown above the ground; more narrowly, leafy;—applied to certain vegetables, as peas and spinach, to distinguish them from roots, as beets and carrots."

In *J. Hamburger Co. vs. Atlantic Coast Line R. Co.*, 229 ICC 795, the Interstate Commerce Commission said at page 796:

"The word 'green' used in conjunction with vegetables generally means fresh in the sense of newly gathered."

The few definitions available convey the commonly understood meanings of the terms "fresh" and "green" as applied to potatoes. The fresh or green potatoes must be in a raw state having the appearance of raw potatoes and usable for the variety of purposes to which a raw potato may be devoted. The extension of the tariff classifications to permit water blanching and freezing is merely a qualification which cannot lawfully be expanded in defiance of rate-making rules.

5. The Commodity—Frozen French Fried Potatoes

The common, ordinary meaning of the words "French fried potatoes" is set forth in Webster's New International Dictionary, 2nd Edition, as follows:

"Potatoes cut into strips and *cooked* by frying deep fat."

The characteristics of the product are its size and shape, and the French frying process to which it has been subjected. The process as described shows that in addition to the water blanching process, the potatoes have been immersed in oil and partially browned. After freezing, they are packaged and labeled as such.

Standards for commercially sold agricultural commodities are controlled by the Federal Food, Drug, and Cosmetic Act, and regulations prescribed by the Department of Agriculture, and tariffs prescribing rates on such commodities are intended to be consistent in terminology and classifications, with such requirements. Section 52.2391 of Title 7, Code of Federal Regulations, describes frozen French fried potatoes as prepared and sold by defendant:

“Frozen french fried potatoes are prepared from mature, sound, white or Irish, potatoes (*Solanum tuberosum*). The potatoes are cleaned, peeled, sorted, trimmed, washed, cut into strips, and are deep fried in a suitable fat or oil. They are frozen in accordance with good commercial practice and stored at temperatures necessary for the preservation of the product.”

Section 52.2396 describes color standards as follows:

“Frozen french fried potatoes that possess a good color may be given a score of 25 to 30 points. ‘Good color’ means that the units possess a characteristic light cream to golden color typi-

cal of properly prepared frozen french fried potatoes; that the product is bright, practically uniform in color and, after heating, is practically free from units which vary markedly from the predominating color."

As a contrast to the above processing, we call attention to Section 52. 2421 describing "peeled potatoes" (which may be cut into various shapes and sizes):

" 'Peeled potatoes' are clean, sound, fresh tubers of the potato plant prepared by washing, peeling, trimming, sorting, and by proper treatment to prevent discoloration, by the use of sulfur dioxide (SO_2) or other means which may be permissible under the provisions of the Federal Food, Drug, and Cosmetic Act. The product is properly packed in suitable containers and securely closed to maintain the product in a sanitary condition."

These contrasting descriptions emphasize the basic distinction between the French fried potato and the fresh or green potato.

By being subjected to the processing described in the Pre-Trial Order (R. 13), we submit that the French fried potato has undergone the very same process which, if resumed for a short time ($1\frac{1}{2}$ to $2\frac{1}{2}$ minutes) (R. 36), would complete preparation for the table. The state of preservation of the potato exceeds that afforded by the water blanching

process to which it has already been subjected (R. 44). Identity with its raw state has been lost by its cooking, distinctive shape and brown coloring. However, of particular significance is the fact that the housewife or commercial user can no longer use it for anything but a French fried potato; nor can it be served creamed, or used in salad. In short, its general utility as a raw potato has been destroyed. These facts are matters of common knowledge of which the Court will take judicial notice.

Sec. 203 (b)(6) of the Interstate Commerce Act (49 USCA 303 (b) (6)) exempts from the application of Part II of the Act:

“motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or *agricultural (including horticultural) commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property or passengers, for compensation.” (Emphasis ours)

The relevance of decisions under this Act (as to whether commodities are in their natural state or “manufactured”) to the issues before this Court lies in mutuality of purpose. In *East Texas Lines vs. Frozen Foods Express*, (April, 1956), 351 U.S. 49, the Court reviewed the legislative history of the exemption provision and concluded that the exemption “was designed to preserve for the farmers

the advantage of low-cost motor transportation" (p. 51). The purpose of the tariff classification now before this Court was to provide lower freight rates on agricultural commodities in their natural state than on those subjected to a higher degree of processing.

In *Home Transfer & Storage Co. vs. U.S.*, 141 F. Supp. 599, aff'd (November 1956) 352 U.S. 844, the United States District Court for the Western District of Washington, Northern Division, was called upon to determine the following question arising under the exemption provision (p. 600) :

"Are frozen fruits and frozen vegetables agricultural commodities or manufactured products thereof?"

The processing applied to the frozen fruits and vegetables was reviewed by the Court (p. 600) :

"Generally speaking, the quick freeze processing here contended by defendants to create non-exempt 'manufactured products' is as follows: To all fruits are added sugars and sirups, and to only peaches ascorbic acid also is added. Vegetables are washed, then blanched by heating them to temperatures high enough to kill the enzymes and then reduced to near zero temperature and uniformly kept that way. Stalky vegetables are sometimes split and less frequently a core is removed to facilitate blanching. Rhubarb is the only vegetable not so blanched, but to it sugar is added. The require-

ment of uniform maintenance of near zero temperature after the quick freeze processing applies to all fruits and vegetables.”

The Court applied the test adopted by the United States Supreme Court in *East Texas Lines vs. Frozen Foods Express*, supra, (351 U.S. 49), quoting from p. 54 of that report:

“‘At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been “manufactured” within the meaning of § 203(b) (6).’ ”

and held that the processing above described did not render the fruits and vegetables “manufactured products.”

An important sequel to this decision occurred in *W. W. Hughes-Extension-Frozen Foods*, MC 105782 Sub (3), where applicant sought a certificate of public convenience and necessity to transport by motor vehicle “fresh, cold-packed and frozen agricultural commodities, fish, sea food, and other frozen foods” between various points in the United States. In its very recent decision dated April 16, 1957, the Commission, by Division 1, adopted the Examiner’s report, which concluded that certain of the commodities sought to be transported were exempt under § 203(b) (6) of the Interstate Commerce Act, citing *Home Transfer & Storage Co.*

vs. U.S., *supra*, as authority therefor. These commodities are described in Footnote 2 to the decision as follows:

“Fruits and vegetables which are washed, placed in cans, have preservative added, and are transported in partially frozen, unfrozen, or completely frozen condition.”

The Commission held, however, that certain of the commodities sought to be transported were *manufactured products* and not exempt. These commodities were described in Footnote 3 as follows:

“Frozen strawberry and other purees; *frozen french fried potatoes*; frozen candied sweet potatoes; frozen eggs; frozen egg yolks; frozen meats; and frozen deviled crabs, deviled clams, fried scallops, ready-to-fry and fried oysters, fried fish fillets, fish sticks, codfish cakes, seafood dinners, deviled lobsters, and salmon croquettes.”

During the course of the trial it was suggested that decisions relating to the agricultural exemption under the Fair Labor Standards Act might, by analogy, have some relevance to the issues before the Court. That Act (29 U.S.C.A. §§ 201-219) prescribes minimum standards for certain classes of labor. Among the employees exempt from the Act are those engaged in “preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market” (§ 213(a)(10)).

The purpose of the exemption concerned the distinctive character of agricultural labor and farm conditions, (*Abram vs. San Joaquin Cotton Oil Co.*, (1942), 46 F. Supp. 969, 973). The labor factors which influenced this legislation are not involved in the classification of commodities for rate-making purposes or in providing economical transportation to the farmer. Regulations under the Act as contained in Title 29 CFR, §780.51, extend the first processing of vegetables "throughout each series of operations, including byproduct operations," commencing with the initial processing if performed at the same place. For example, the preparation of apples in their "raw or natural state" extends from peeling and coring to the production of pomace. The preparation of citrus fruit in its "raw or natural state" begins with the fresh fruit and includes the production of molasses from citrus waste. An examination of decisions under the Act accordingly reveals rulings which extend the stages of primary processing beyond the limits of interpretation applicable to the tariff language in this case.

SPECIFICATION OF ERROR II

Summary of Argument

1. The terms of the tariff items are clear and unambiguous and require no extrinsic evidence to aid their construction.

2. Expert testimony is not admissible to explain the terms of a tariff which are clear and unambiguous.

3. Under the rules of primary jurisdiction, when the terms of an interstate tariff are not clear and unambiguous, the Court has no jurisdiction to construe such tariff prior to a determination as to its meaning by the Interstate Commerce Commission.

4. An action based upon ambiguous terms of an interstate tariff should be stayed pending a determination by the Interstate Commerce Commission of the meaning of such terms.

Argument

Defendant, over plaintiff's objection, was permitted to introduce the testimony of defendant's witness Evan Gheen, Jr. (R. 31-53). The Court also received in evidence defendant's Exhibits 1, 2 and 3, which consisted of samples of labels in which the French fried potatoes prepared by defendant were shipped and marketed.

The Agreed Facts contained in the Pre-Trial Order are, we submit, all that was necessary to enable the Trial Court to determine the legal issues involved in the case. These facts embrace matters relating to the jurisdiction of the Court; the status of the parties; the shipments involved; the tariff items in question; a computation of the charges claimed to be due by each of the parties; the amount of the charges

actually paid; and a complete description of the process to which the potatoes were subjected. If Mr. Gheen's testimony is to be deemed relevant and accorded any weight, it must be considered necessary to enable the Court to construe the language of the tariff. The Trial Court must have determined that the language of the tariff was used in a peculiar or technical sense requiring specialized knowledge as to usages and practices in the trade, or of many intricate facts of transportation.

Expert Testimony

In the argument under Specification of Error I, we discussed a number of decisions which held that where the words of a tariff are clear and unambiguous, a question of law only is presented. In its strict sense the tariff is not subject to "construction." (*Penn. R. Co. vs. Fox & London*, supra (93 F.2d 669, 670)).

In *Black vs. Southern Pac. Co.*, supra (88 Or. 533; 171 P. 878), the Court was concerned with the question whether certain shipments were subject to a rate providing for refrigeration or a lower rate without such provision. The Trial Court allowed witnesses to testify as to the necessity for use of refrigerator cars. The Supreme Court, in reversing the Lower Court, said at page 537:

"It is the exclusive province of the court to construe the tariff provisions involved in this

controversy, and it was therefore error to permit rate experts to construe them.”

Doctrine of Primary Jurisdiction

If the Court were to find that the language of the tariff items in question is not plain and unambiguous, but that extrinsic evidence may be necessary to determine the peculiar meaning of the language, or to establish custom and usage, then an issue of fact arises. In *Great Northern Railway Company vs. Merchants Elevator Company*, supra, (259 U.S. 285) the Court considered such a contingency in the construction of a tariff, stating at pages 291 and 292:

“When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the de-

cision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.”

This principle was reiterated in the very recent decision of the United States Supreme Court in *United States vs. Western Pacific Railroad Company*, (December, 1956), 77 Supreme Court Reporter 161. The Court grounded its decision upon the two earlier cases of *Texas & Pacific R. Co. vs. American Tie & Timber Co.*, 234 U.S. 138, and *Great Northern R. Co. vs. Merchants Elevator Co.*, *supra*,

(259 U.S. 285) and said (p. 165):

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576.”

The following are specific instances in which the doctrine was applied:

Whether a steel bomb case filled with napam jell without burster charges and fuses constituted “incendiary bombs” or “gasoline in steel drums” (*U.S. vs. Western Pacific R. Co.*, *supra*); whether shipments of oak railway cross-ties were subject to the tariff of lumber (*T.&P. Ry. Co. vs. American Tie & Timber Co.*, *supra*); whether shipments of electric refrigerators were classified as “cooling boxes or refrigerators and cooling or freezing apparatus

combined" under the 4th-class rate, or "cooling or freezing machines, cooling boxes or refrigerators" under the 5th-class rate (*Norge Corp. vs. Long Island R. Co.*, (1935) 77 F.2d 312); see also footnote on page 295 of 259 U.S. for additional citations.

The following are specific instances in which the doctrine was not applied:

Whether shipments of airplane, tank, and boat internal combustion engines were subject to an exception of "engines, internal combustion" under the heading "automobile parts," or "engines, steam or internal combustion, N.O.I.B.N." and "other articles" (*U.S. vs. M.K.T. R. Co.*, *supra*); whether shipments of paper were properly classified as "waste paper" or "spitting cups" (*Reading Co. vs. Penn Paper & Stock Co.*, *supra*); whether shipments of pickled fish were subject to rates on "fish, salted and pickled, (including caviar), under refrigeration," or to rates on "fish, salted and pickled, (including caviar)," (*Black vs. S.P. Co.*, *supra*); whether shipments of corn were subject to an exception applicable to "Grain, seed (field), seed (grass), hay or straw" (*Great Northern Ry. Co. vs. Merchants Elevator Co.*, *supra*); which of two minimum charge regulations was applicable to shipments of fresh meat (*Great Northern Ry. Co. vs. Armour & Co.*, *supra*); whether shipments of obsolete vehicle parts were subject to the rate on "auto parts and engine parts other than auto bodies having value for re-

conditioning," or the rate on "scrap iron or steel having value for remelting purposes only" (*Northwestern Auto Parts vs. Chicago B. & Q. R. Co.*, supra); see also footnote on page 295 of 259 U.S. for additional citations.

Referral to the Interstate Commerce Commission

In *United States vs. Western Pacific R. Co.*, supra (77 S.C. Rep. 161), the United States Supreme Court remanded the proceedings to the court of claims so as to permit reference to the Interstate Commerce Commission, holding that a two-year statute of limitation did not bar such reference of questions raised by way of defense.

In *Norge Corp. vs. Long Island R. Co.*, supra (77 F.2d 312), the Court observed (p. 315):

"The court might have followed the practice suggested in *Southern Ry. Co. v. Tift*, 206 U.S. 428, 27 S. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846, and *Mitchell Coal & Coke Co. v. Penn. R. R. Co.*, 230 U.S. 247, 248, 33 S. Ct. 916, 57 L. Ed. 1472, and have held in abeyance its decision on the motion for summary judgment until the appellee procured a determination by the Interstate Commerce Commission of the meaning of the classification items."

In *Southern Ry. Co. vs. Tift*, cited in the last quotation, the court dissolved a temporary injunction permitting complainants to make application to the Interstate Commerce Commission, with the privilege

thereafter of renewing their application to the Court. In *Mitchell Coal Co. vs. Penn RR. Co.*, also cited, the Court stayed dismissal of the complaint so as to allow plaintiff to present its claim to the commission as to the reasonableness of the practice in question, with the right thereafter to proceed with the trial in the District Court.

In *U.S. vs. Garner*, (1955) 134 F.Supp. 16, the Court ordered the action held in abeyance until plaintiff had an opportunity to apply to the Interstate Commerce Commission for a ruling as to the reasonableness of the rates involved. The Court cited as authority for its action *U.S. vs. K. C. Southern Ry.*, 217 F.2d 763, and *Bell Potato Chip Co. vs. Aberdeen Truck Line*, 43 MCC 337.

TESTIMONY OF EVAN GHEEN, JR.

and

EXHIBITS 1, 2 AND 3

Should the Court find it proper to consider the testimony of Mr. Gheen (and Exhibits 1, 2 and 3), we call attention to the following to show that such evidence is not actually adverse to appellant's position. (The principal references are supplemented in Appendix A to this Brief.)

The French fried potato undergoes a water blanching process prior to its oil treatment (R. 34). While one purpose of the water blanching and oil treatment is to inactivate the enzymes, there are

still other reasons why the customer demands the oil process:

(a) Both the institutional user and the housewife demand the oil coating (R. 35, 53).

(b) The defendant is able to perform the oil frying more cheaply than the customer (R. 35).

(c) The oil coating prevents the individual pieces from sticking together (R. 35).

(d) The oil coating reduces absorption of oil during final preparation by the customer (R. 36, 37).

(e) The oil frying imparts a special flavor to the potato (R. 43).

(f) The French fried potato has a higher quality of preservation than the water blanched potato (R. 43, 44).

(g) The color of the product sold at retail is the same as that served at the table (R. 50).

(h) The product sold to the institutional user is a custom product, complying with individual specifications (R. 46, 47).

(i) The unthawed French fried potato requires frying in deep fat for only $11\frac{1}{2}$ " to $21\frac{1}{2}$ " in preparing for table use (R. 36). This demonstrates the effectiveness of the oil frying process which supplants additional minutes of water blanching applied to the raw product not undergoing French frying. It is obvious that if the original process of oil "blanching" were continued for only a fraction

of a minute, the product would be ready for the table.

Certain other features serve to distinguish the French fried product from the raw potato:

(1) The French fried potato is a more valuable product than the processed raw potato, and sells for as much as 2¢ to 3¢ a pound more (R. 37).

(2) While the raw processed potato may be used for a variety of purposes, the French fried potato may be used only as such (R. 45, 46).

The samples of labels (Exhibits 1, 2 and 3) used in packaging the product destined to the housewife are illustrative of the distinctive and specially processed character of the French fried potato. They are described as "Golden French Fried Potatoes," and depicted in their golden brown color. They are represented as having been "cooked in pure vegetable oil" (R. 46); and it is stated that "after being fried in pure vegetable oil, they are immediately quick-frozen to seal in all the goodness and food values." In marketing and shipping this product as "French fried potatoes," the producer makes these definite representations to the public at large, including the appellant.

It is to be remembered that appellee is not a producer of agricultural products. Its sole operation is that of a food processing and quick freezing plant. It sells the finished product in the normal channels

of trade ready for use. The greater part of its processing operations are designed to give the product distinctive characteristics to facilitate their sale as a superior brand under particular labels. All this is quite apparent from Mr. Gheen's testimony, taken as a whole.

But appellee's witness also testified on another and different subject. He testified concerning the history of the freight rates applied to the two classifications in question (R. 37, 38); transportation characteristics such as difference in cost of shipping (R. 37, 38); customer attitudes with respect to freight rates (R. 38); and differences in values of products shipped under the two classifications (R. 37). All such matters involve factors of rate making and classification which, if necessary for consideration in order to determine the applicable rate, are within the exclusive primary jurisdiction of the Interstate Commerce Commission in the exercise of its expert and specialized functions.

CONCLUSION

Cursory discussion of the two tariff items in question may develop apparent ambiguities and over-lapping; but presumably there must have been some valid reason for the separate classifications and the different rate levels. We submit that this purpose becomes quite obvious when we consider some of the relevant factors from the rate-making point of view.

Item 4715, which prescribes the lower rates, applies to "fresh or green" vegetables—a term not at all confusing to any housewife who does the family shopping. Broadly speaking, it refers to vegetables in the original form in which they were produced by the grower, although cleansed and treated to preserve them in that form. They are products of the soil in which the grower still has an immediate interest. Transportation rates may, in some cases at least, directly affect the grower's return on his crop.

Item 4600, on the other hand, relates to food which has been processed (usually at a plant such as appellee's) and more closely resembles a manufactured product. What had originally been known as a "fresh vegetable" has been transformed into what is commonly called a "food," having been cooked, cured or preserved and thereby committed to a particular use. Transportation rates on such commodities affect the grower only indirectly, if at all.

More than 30 years ago Congress became interested in the effect of freight rates on the welfare of farmers. By the Hock-Smith Resolution, passed in 1925, Congress directed the Interstate Commerce Commission to investigate all freight rates on farm products and reduce them to "the lowest possible lawful rates compatible with the maintenance of adequate transportation service" (43 Stat. 801-802),

and the Commission proceeded to do so. (164 ICC 319; 205 ICC 301). Some ten years later Congress passed the Motor Carrier Act but exempted from its provisions "motor vehicles used exclusively in carrying * * * agricultural commodities (not including manufactured products thereof)" (49 Stat. 545). While this exemption did not extend to railroads, it did have the effect of subjecting railroads to competition with unregulated truck transportation of agricultural commodities "not including manufactured products thereof." As anticipated by Congress, railroad rates on such exempt commodities had to be readjusted to meet that competition.

So, whether wisely or otherwise, Congress has established a policy which has had the effect of giving producers of agricultural products a certain degree of preferential treatment in the matter of freight rates. Appellee, though not such a producer, now seeks to take advantage of the lower rates designed to benefit only the growers of fresh vegetables. But appellee was expressly excluded from such benefits under the Motor Carrier Act when it ships the "manufactured products"; and we submit that it is likewise excluded from the benefits of the

lower rail tariff rates established to meet truck competition in the transportation of those same exempt agricultural commodities.

Respectfully submitted,

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APPENDIX A

Demand for Oil Processing

“Q. Is there any other purpose in oil-blanching?

A. The only other purpose would be to coat the product with oil.

Q. Why is that desirable?

A. Because the customer wants us to coat it with oil, as we can do it cheaper than he can.

Q. Is there any advantage relative to shipping?

A. There is an advantage both in the freezing and in shipping. If you don't coat it in oil, the product sometimes sticks together so that the shipper would have difficulty in separating the individual pieces. At the same time, it can be done. I wouldn't say that there is an advantage in shipping, no.” (P. 35)

* * *

“Q. Now, if this potato did not have an oil coating on it, would the housewife be able to prepare it by putting it in the oven?

A. She could prepare it, but it wouldn't necessarily be something she would want.

Q. It would not be a desirable thing without this oil coating?

A. Not in our opinion.

Q. You find that true in the trade?

A. Yes.

Q. That is why you put the oil coating on it?

A. Yes." (R. 53)

★ ★ ★

"Q. Why do the institutional users want the oil on the potato?

A. Because it decreases the amount of oil that is absorbed by the potato in their own fryer, and we can buy oil cheaper than they can, and we can coat the potato cheaper than they can, and it decreases the amount of time that is required to reconstitute the product in their own shop." (R. 36, 37)

★ ★ ★

"Q. With respect to this oil-blanching process, Mr. Gheen, is any flavor imparted to the potato as well as the heat?

A. The flavor of the oil, I guess, you would say would be imparted.

Q. Would you say it is that flavor which largely distinguishes French-fried potatoes from other types?

A. That is a very vague question. In the finished product the inside of the potato is—in the finished

product as the ultimate user gets it the inside of the potato is very much like a baked potato and the outside has the flavor of oil, you might say, the crust.” (R. 43)

* * *

“Q. Does the French-fried potato have any greater or less qualities of preservation than the water-blanching vegetables?

A. It depends on the degree of water-blanching, or one thing, and on the inherent qualities of the potato. In a general way, a potato which has been oil-blanching would stay out in the open air for a slightly longer time than one which had not been oil-blanching. That is part of the reason for the coating of oil, is that it helps the chef in the time element that is involved in his work.” (R. 43, 44)

* * *

“Q. Now, Mr. Gheen, returning once again to these specifications, you have indicated the specifications by color number. Now, can you give us an idea as to what times are involved there? In other words, what is the spread, the time spread?

A. The time spread is 30 seconds. We don't set about to produce anything higher than a No. 2 in color. Institutional users are predominantly zero to one, from colorless to a light color. All they want is the oil coating on there. The retail housewife—

these buyers who interpret the housewife's desires say that they want something halfway between a 1 and 2 in color. To achieve a zero to one we pass it through for a period of one minute plus or minus. To achieve a 1 to 2 color we pass it through for a period varying up to one and a half minutes.

Q. The 1 to 2 color, I assume, is the color one might ordinarily find on the potatoes as served on the table; isn't that right?

A. That is correct. It is described as a light golden color." (R. 50)

★ ★ ★

"Q. Now, is your product then produced more or less in accordance with the specifications of your customer?

A. That is correct. They are.

Q. And I understand, then, that he specifies a particular shade of color which you have indicated might be No. 1, No. 2 or—how far do these designations go?

A. He designates the color. A particular buyer of frozen food, they specify the color. Others do not.

Q. Will you tell us all of these specifications of color. You indicated some numbers. How many numbers are there?

A. There are a total of four numbered colors. However, there can be color above and below the four numbered ones. The colors are 1, 2, 3 and 4, in order light, medium, dark and very dark." (R. 6, 47)

Distinguishing Features of French Fried Potato

"Q. Is the oil coated French fry a more valuable product than a French cut?

A. Approximately two cents a pound. It varies sometimes up to three cents a pound." (R. 37)

* * *

"Q. Taking the French-fried potatoes as such, in the hands of the consumer, as far as you know, it is used only as a French-fried potato; is that correct? In other words, in the course of preparation the resulting product for the one who is going to consume it is that it is identified only as a French-fried potato; it is not ordinarily adaptable for other types of cooking. For instance, would you use it in soups?

A. I don't think, by and large, that you would use it for anything else.

Q. That is right. Now, on the other hand, the other types of vegetables which have been subjected only to water-blanching might be used by the housewife for many different cooking purposes?

A. It depends on the shape of the product that is presented to them.

Q. For instance, let's take peas. Your frozen peas are used—I assume they can be boiled and served as such; is that right?

A. Correct.

Q. And they can be served in salads?

A. You would cook them first, I think.

Q. You would cook them, yes, that is right. But they could be served in salads and they could be placed in stews and soups; isn't that right?

A. Yes." (R. 45, 46)

★ ★ ★

No. 15582

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Oregon

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United States
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UNION PACIFIC RAILROAD COMPANY,
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Appellant,

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ORE-IDA POTATO PRODUCTS, INC.,
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Appellant's Reply Brief

Appeal from the United States District Court
for the District of Oregon

For the convenience of the Court, the following Reply to appellee's Brief is patterned generally according to the headings employed by appellee.

SPECIFICATION OF ERROR I

Motion for Summary Judgment

(Appellee's Br. p. 3)

Contrary to the statements made by appellee, this Specification excepts not only to the refusal to grant plaintiff's Motion for Summary Judgment, but also to the Findings and Conclusions of the Court with

respect to the classification of the frozen French fried potatoes. Although appellant offered no testimony, it conceded no facts other than those set forth in the Pre-Trial Order. The testimony offered by appellee did in fact go beyond mere amplification of the facts set out in the Pre-Trial Order. As pointed out at p. 33 of our opening Brief, it included expert testimony as to various factors of rate making and classification.

Cardinal Rules of Construction

(Appellee's Br. p. 4)

Appellee asserts the principle that where two tariff descriptions are equally appropriate, that which prescribes the lower rate, or that which is more specific should be deemed to apply. This principle is conceded, but while the decisions cited by the appellee recognize the existence of the principle, they do not illustrate its application. (These decisions are discussed briefly in Appendix A to this Brief.)

In every case the Court held that one of the classifications was more appropriate to the commodity in question. In every case the commodity might reasonably have been embraced within either of the two classifications involved. In five of the cases, the Court referred to decisions, rulings, or regulations of the Interstate Commerce Commission with respect to the commodity or practice involved.

Frozen French fried potatoes could not conceivably be both “vegetables, fresh or green” *and* “food, cooked, cured or preserved”. The two tariff items accordingly are not “equally appropriate”. Appellee asserts that the French fried potato “fits every word contained in the description under Item 4715”. In at least eight instances (Appellee’s Br. pp. 7, 8, 14) a comparison is made between French fried potatoes and “vegetables” or “potatoes” without reference to the words “*fresh or green*”. This is a serious oversight. Admittedly “vegetables” could be included in either Item 4715 or Item 4600, but only a “*fresh or green*” vegetable could be included under Item 4715. And conversely, while the general category of “food, cooked” might include the specific item of “vegetables”, it could not include “vegetables, *fresh or green*”.

***Comparison with Decisions Under
the Fair Labor Standards Act***

(Appellee’s Br. p. 8)

Appellee asserts there is “close similarity” between the issue of classification in this case and those under the Fair Labor Standards Act. This is sought to be illustrated by three decisions under that Act. In *McComb vs. Hunt Foods*, 167 Fed. (2) 905, the Court held that the production of apple juice or pomace from peelings and cores received from dehydrating plants constituted “first processing” of fresh fruits.

In *Hendricks vs. DiGiorgio Fruit Co.*, 49 Fed. Supp. 573, the Court held that wine making from fresh grapes, including the distillation of brandy used to fortify the wine, was “first processing”.

In *Mitchell vs. Oregon Frozen Foods Company*, 145 Fed. Supp. 157, appellee points out that the Government conceded French fried potatoes to be exempt under the “first processing” clause. The concession as stated on page 159 of the opinion reads:

“The Government concedes that the *freezing* of potatoes by Ore-Ida Potato Co., is exempt under Section 207(b) (3).”

Said section was set forth on page 160 of the opinion, wherein it appears that the basis of that exemption is the seasonal nature of the industry, rather than the nature of the product. The Court noted at page 161 the Government’s second contention (with respect to the claim for exemption under Section 213 (a) (10)), that “*blanching and freezing** the commodities changes them from their raw and natural state”. The Court, however, denied exemption because the “area of production” requirements of the section had not been met, and said at page 161:

“It is, therefore, not necessary to decide the second contention pertaining to the *blanching and freezing*.”

*All emphasis in quoted matter in this Brief is ours unless otherwise indicated.

It accordingly appears from the decision that the concession of the Government did not extend to the effect of the "blanching and freezing" process upon the potato in its raw and natural state.

We submit, however, that the extreme limits of "first processing" recognized under the Fair Labor Standards Act illustrate that no analogy exists between decisions under that Act and the issue before this Court. The quotation in the *Mitchell* decision at page 162 from the opinion of Judge James Alger Fee in *Walling vs. California Conserving Co., Inc.*, D.C., 74 F. Supp. 182, 183, emphasizes the purpose of the exemption to be related primarily to seasonal labor factors. For further reply to appellee, the Court is respectfully referred to pages 21 and 22 of our opening Brief.

***Comparison with Decisions
Under the Motor Carrier Act***
(Appellee's Br. p. 11)

Substantial Identity
(Appellee's Br. p. 11)

The relevance of decisions under the Motor Carrier Act was discussed at pages 18 and 35 of our opening Brief. Appellee agrees that such decisions are relevant and cites three decisions under this Act at pages 11 to 14 of its Brief with respect to the "continuing substantial identity" test. None of these decisions, however, can afford solace to appellee, because the only vegetables mentioned therein are

“fresh vegetables for quick freezing”; “fresh cut up vegetables in cellophane bags”; “fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes”; and “vegetables (quick-frozen)”. These decisions do not touch upon frozen French fried potatoes. The only decision dealing with this commodity is that of the Interstate Commerce Commission in *W. W. Hughes Extension—Frozen Foods*, M.C. 105783 Sub (3), dated April 16, 1957, which specifically holds that “frozen french fried potatoes” are *manufactured* products, and not exempt. We have previously noted in five cases discussed in Appendix A hereto, the consideration given by the Courts to decisions of the Interstate Commerce Commission on classification of commodities. By the same token, we believe that this decision is entitled to great weight, for it presages the views of the Commission on the prime issue in this case were it to be referred to that body.

Killing Enzymes

(Appellee’s Br. p. 15)

Comparison of French Fries with Other Products of Appellee

(Appellee’s Br. p. 15)

Definition of Words Under Tariff Item 4600 and 4715

(Appellee’s Br. p. 16)

For response to appellee’s version of the oil frying process and its purposes, we respectfully refer the

Court to the excerpts of testimony of Evan Gheen contained in Appendix A to our opening Brief.

Appellee contends that the frozen French fried potato has not changed its substantial identity from that of the potato in its “fresh or green” state. Emphasis is placed upon the inapplicability of the words in Item 4600 “cured” or “preserved”. “Cooked” is construed to mean completely cooked. As discussed in our opening Brief, we believe such construction is not justified. Appellee on the other hand does not discuss the significance of the words “*fresh*” or “*green*” as contained in Item 4715, which it contends is applicable. Yet the connotation of these words, used in conjunction with each other clearly excludes a product such as the French fried potato, which even though not completely cooked, has nevertheless gone through a distinctive combination of processes of shaping, water blanching and frying in oil. Those processes, we submit, have changed its substantial identity from that of the raw “fresh or green” potato. We refrain from further repetitive argument and respectfully refer the Court to pages 11 through 16 of our opening Brief.

In the conclusion of appellee’s Brief, the Court is requested to take “Judicial notice of the nature and use of the product”. Its nature and use are clearly set forth in Exhibits 1, 2 and 3 which were offered as typical labels under which the product was shipped and marketed. The contents are described as

“Golden French Fried Potatoes” and depicted in their golden brown color. They are represented as having been “cooked in pure vegetable oil”. It is stated that “After being fried in pure vegetable oil, they are immediately quick-frozen to seal in all the goodness and food values”. While some instructions call for heating in an oven for 15 to 25 minutes, others indicate “10-15 minutes or until piping hot” to be sufficient. We repeat the commonly understood Webster definition of “French fried potatoes” quoted at page 15 of our opening Brief:

“Potatoes cut into strips and *cooked* by frying in deep fat.”

As we pointed out in our opening Brief (p. 32), such labeling constitutes “definite representations to the public at large, including the appellant”. The significance of such representations is emphasized by a line of decisions of the Interstate Commerce Commission extending throughout the years from prior to 1910. In *J. B. Ford Company vs. Michigan Central Railroad Company et al*, (1910), 19 I.C.C. 507, the Commission quoted from the earlier decision of *Andrews Soap Co. vs. P. C. C. & St. L. Ry.*, 4 I.C.C. Rep., 41:

“A manufacturer’s description of an article to induce its purchase by the public also describes it for transportation, and carriers may accept his description for purposes of classification and rates. Carriers are not required to analyze

freight to ascertain whether it is in fact inferior to the description or public representations under which it is sold, in order to give it a lower rate corresponding to its actual value.”

In *Krause Plow Corp. v. Akron, C. & Y. R. Co.* (1952), 284 I.C.C. 65, the Commission said:

“We have frequently found that the manufacturer’s description of a commodity for sales purposes is to be given consideration in determining the proper classification and rates. See *Norge Corp. v. Long Island R. Co.*, 220 I.C.C. 470, 474, and cases cited.”

In *Chicago, B. & Q. R. Co. vs. California Wine Co.*, (1942), 40 N.E. 2d 624, the Appellate Court of Illinois said:

“If a manufacturer finds it advantageous to describe his product in a manner calculated to give purchasers the impression that it is a different and higher-grade article than it actually is, he can not consistently complain if the carriers accept that description as a basis for the assessment of freight charges. *Andrews Soap Co. v. Pittsburgh, C. & St. L. Ry. Co.*, 4 I.C.C. 41; *Glidden Co. v. Akron, C. & Y. Ry. Co.*, 153 I.C.C. 684.”

SPECIFICATION OF ERROR II

We believe that little reply is warranted to appellee’s discussion of this Specification, and appellant will rely upon its opening Brief in this respect.

CONCLUSION

We respectfully submit that the judgment of the lower court should be reversed and judgment rendered for plaintiff-appellant.

Respectfully submitted,

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APPENDIX A

United States vs. Strickland Transp. Co., Inc., 5 Cir., 200 Fed. (2) 234

The Court was concerned whether "Internal combustion engines" were to be classified as "Machinery or Machines or Parts Named—Engines, steam or internal combustion, N.O.I." or "Aircraft or parts named—Aircraft Parts N.O.I. other than cloth and metal or wood combined.", to which a higher rate applied.

The Court noted rulings of the Interstate Commerce Commission on the specific classifications involved (page 236—Note), and held that the first classification "more precisely describes and better fits the shipments in question".

Willingham vs. Seligman, 5 Cir. 179 Fed. (2) 257

The Court was asked whether shipments of shelled pecans tendered in quantity lots, but which moved in more than one truck on different days constituted single shipments entitled to a lower, quantity rate.

The Court noted an administrative ruling of the Interstate Commerce Commission on the subject (page 259) and held that the shipments were in fact single shipments.

U. S. vs. Gulf Refining Co.,
69 L. E. 1082; 248 U. S. 542

The question was whether a distillation of petroleum known as "casing head gasoline" was properly classified as "unrefined naphtha" or "gasoline", for which a higher rate was prescribed.

The Court gave careful consideration to the processing of the commodity and held the former to be the proper classification. The Court also referred to regulations of the Interstate Commerce Commission (page 550) relative to the handling of the product and to decisions of the Interstate Commerce Commission relative to the classification of petroleum products (page 548).

Buch Express vs. United States
132 Fed. Sup. 473

The Court was concerned whether shipments of "radar equipment" were "Electrical Appliances or Equipment" as "Radio Transmitting and Receiving Sets Combined" or "Drawing Instruments, Optical goods or Scientific Instruments", either as "Range or Height Finders", or as "Scientific Instruments, N.O.I.", which moved at a higher rate.

The Court held that "considering the underlying transportation characteristics involved", the first classification applied.

***West Coast Products Corp. vs.
Southern Pacific Co., 9 Cir.
226 Fed. (2) 830***

The issue was whether shipments of olives cured with rock salt and then coated with olive oil were "Olives, salt cured, not preserved in liquid, in water proof barrels, boxes, kits or pails" or "Olives, canned or preserved in juice or in syrup, or in liquid other than alcoholic" which carried a higher rate.

The Court considered the processing of the commodity and concluded that the first-mentioned classification properly applied, and that no ambiguity existed in this respect.

***Baltimore & Ohio R. Co. vs.
Owens-Illinois Glass Co.
133 Fed. Sup. 680***

The issue concerned whether shipments of "sand" were "sand or gravel", or were "glass" or "silica" sand which took a higher rate. The Court in effect sat in review of a decision of the Interstate Commerce Commission which held that the higher rate applied. The Court concluded:

"We are of the opinion that the Interstate Commerce Commission was correct in its construction of the tariff involved" (page 703).

***Motor Cargo vs. United States
124 Fed. Sup. 370***

The question was whether "gun controls" or "power drives" were to be classified "machinery or

machines N.O.I.", or "gun mount parts", or were "anti-aircraft directors", taking a higher rate.

The Court held that the latter was the proper classification, but that the carrier and the Government had actually contracted for the lower rate. The Court noted that the Interstate Commerce Commission had passed upon the classification of the commodity in question and had indicated that the higher rate applied (page 373).

***Louisville & N. R. Co. vs.
United States
109 Fed. Sup. 464***

The issue was whether a "jeep" should be classified as a "freight" automobile, a "dumping or hauling" vehicle, or a "passenger" automobile, the last classification taking a higher rate.

The Court held that the last classification was proper, and that the higher rate should be charged.

***Atchison Topeka & Santa Fe Ry. Co.
vs. Simpson, 109 Fed. Sup. 616***

The issue was whether certain carloads of wheat had been weighed "outbound" or had been weighed "en route", in which latter instance a higher charge would apply.

The Court held the lower charge to apply, since the shipper should not be penalized because the carrier had no track scales at the point of origin.

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,
Appellee.

Brief for Appellee

Appeal from the United States District Court
for the District of Oregon

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United States
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For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

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PRE-IDA POTATO PRODUCTS, INC.,
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Appellee.

Brief for Appellee

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

The Appellant makes only two Specifications of error and we will discuss them in the same order as discussed in their brief. The Statement of the Case, Jurisdiction, Facts, Issues and Record on Appeal are well stated by the Appellant and we take no exception to them.

SPECIFICATION OF ERROR I

Summary of Argument

1. Motion of Summary Judgment was properly refused.
2. Cardinal rules of construction are:
 - (a) Any doubt or ambiguity is to be resolved in favor of shipper.
 - (b) If two rates are equally applicable the shipper is entitled to the lower of the two.
 - (c) If there are two rates applicable, one being more specific, the specific will control over the general.
3. Comparison with Fair Labor Standards Act and Motor Transport Act.
4. Substantial identity.
5. Killing enzymes is not cooking.
6. Comparison of french fries with other products of Appellee.
7. Definition of words under Tariff Item 4600 and 4715.

AUTHORITIES

- United States vs. Strickland Transp. Co., Inc.*
200 Fed. (2) 234
- Willingham vs. Seligman*, 179 Fed. (2) 257
- U. S. vs. Gulf Refining Co.*, 69 L. E. 1082
- Buch Express vs. United States*, 132 Fed. Sup. 473
- West Coast Products Corp. vs. Southern Pacific Co.*, 226 Fed. (2) 830

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co., 133 Fed. Sup. 680

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McComb vs. Hunt Foods, 167 Fed. (2) 905

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Home Transfer & Storage Co. vs. United States, 141 Fed. Sup. 599

Frozen Food Express vs. United States, 148 Fed. Sup. 399

Motor Cargo vs. United States, 124 Fed. Sup. 370

ARGUMENT

Motion of Summary Judgment was properly refused

This Specification deals with the refusal of the Court to grant Appellant's Motion for Summary Judgment. The most obvious answer to this is the fact that the Court did not feel that the plaintiff was entitled to judgment, either summary or otherwise. It is a Motion for Summary Judgment in favor of the plaintiff and if the merits did not warrant a judgment for plaintiff such Motion was properly denied. We will discuss the merits further along in the brief. The authorities set out under this first Specification on pages 8, 9 and 10, state the general law relative to the duty of the Court to construe the tariff. However, the fact that the construction of a

tariff is a matter of law does not indicate the issues are to be determined on a motion for summary judgment. The Appellant did not submit any testimony and therefore all the facts are conceded and it became a question of law based upon the testimony and pre-Trial Order for determination by the Court. The testimony that was submitted was simply in amplification and further explanation of the facts set out in the Pre-Trial Order. It was not introduced for the purpose of introducing expert testimony nor to prove any peculiar uses in a trade or locality.

Cardinal Rules of construction.

United States vs. Strickland Transp. Co., Inc., 200 Fed. (2) 234 at 235:

“We think this is so, too, because, if it be considered that the shipment could come under either of the two classifications, the shipper was entitled to the ‘Machinery or Machines’ classification because the rate prescribed by it is the lower. * * * If it could be considered that there is an ambiguity in the tariff and is not made clear under which rating the articles shipped come, the ambiguity must be resolved in favor of the shipper, and the lower rate must be awarded to him.”

Willingham vs. Seligman, 179 Fed. (2) 257 at 258:

“In general there is nothing peculiar about the canons of construction in dealing with freight tariffs. They are interpreted in much the same way as contracts and statutes. Where general and specific provisions overlap, the specific is deemed to be an exception to the general rule.

Ambiguities are resolved against the carrier and in favor of the shipper. The shipper is entitled to the lowest published rate properly covering his tendered shipment."

U. S. vs. Gulf Refining Co., 69 L. E. 1082 at 1085:

"Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. (citing) And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates. (citing) It follows that, if the property in question properly might have been described either as gasoline or as unrefined naptha, the lower grade was lawfully applied, and defendant was not guilty. And the burden was on the United States to prove beyond a reasonable doubt that the property so shipped was gasoline, and was not unrefined naptha."

Buch Express vs. United States, 132 Fed. Sup. 473 at 476:

"Even were the two descriptions and tariffs equally appropriate, the shipper is entitled to have applied the one specifying the lower rates." (citing)

West Coast Products Corp. vs. Southern Pacific Co., 226 Fed. (2) 830 at 832:

"Unquestionably, if the shipment could be included in more than one tariff designation, it would be proper to select the item more specifically applicable to the product being transported. If there were two tariff descriptions equally ap-

propriate, West Coast, as shipper, would be entitled to the lower rate."

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co., 133 Fed. Sup. 680 at 702:

"It seems to be the law that where a commodity is included in more than one tariff designation, that which is more specific will be held applicable."

Motor Cargo vs. United States, 124 Fed. Sup. 370 at 371:

"Frequently the tariffs filed with the Interstate Commerce Commission do not specifically describe the article carried, but the rule is that the classification which comes nearest to a description of the article carried determines the rate to be collected, if it can fairly be said that the article comes within that classification. (citing) Gun controls or power drives are not specifically named in any tariff filed by the carrier with the Interstate Commerce Commission."

Louisville & N. R. Co. vs. United States, 109 Fed. Sup. 464 at 467:

"Where two or more classifications appear to be equally applicable, the shipper is entitled to have applied the lower classification. (citing)"

Atchison, Topeka & Santa Fe Ry. Co. vs. Simpson, 109 Fed. Sup. 616 at 617:

"The shipper contends that where two provisions

of a tariff are equally appropriate it is entitled to have applied the one specifying the lower rate. The parties also differ as to whether there is an ambiguity in the published tariffs, the shipper relying upon the rule that in the event of ambiguity the doubts are to be resolved in its favor while the carrier, although recognizing the rule, says it is inapplicable."

As applied to this case, if there is any doubt in the mind of the trier of the facts as to whether french fried potatoes are cooked food or frozen vegetables, those doubts should be resolved in favor of the shipper. We are dealing with a product here to which heat has been applied but there is very serious question as to whether this application of heat cooks the potato. This doubt likewise should be resolved in favor of the shipper.

We do not concede that Item 4600 is in any way appropriate for french fried potatoes. On the other hand if the Court felt that it did apply, then it is even more clear that Item 4715 also applies. There can be no question but what a french fried potato is a vegetable, nor that it is a fresh vegetable, and there can be no doubt that it is frozen. The french fried potato fits every word contained in the description under Item 4715. Therefore, if it could be considered as coming under both of the classifications, the Appellee is entitled to Item 4715, that being the lower of the two rates.

Again if we concede for the purpose of argument,

that french fried potatoes are properly classified under Item 4600 as well as Item 4715, then under the above authorities Item 4715 is the proper classification for the reason it is more specific than Item 4600. The latter classification includes all kinds of cooked food as well as cured foods or preserved foods which are frozen. It would cover a great volume of articles which in the present day market are cooked and frozen. On the other hand Item 4715 is much more specific, it is limited to vegetables. It could not be applicable to meat, poultry, fish, pies, dinners or ice cream. It is limited strictly to vegetables. Vegetables is of course much more specific than food. Food is the general term which of course includes vegetables but vegetables is a more specific designation of a type of food.

Comparison with Fair Labor Standards Act and Motor Transport Act.

There is a close similarity between the question under consideration and the questions which have arisen under the Fair Labor Standards Act. There is also a close similarity between this case and cases arising under the Motor Transport Act. We will discuss the cases under these two items. Under the Fair Labor Standards Act there were certain exemptions by reason of first processing of agricultural commodities. First processing is usually those first things that are done to vegetables in preparing them for

market. Generally, it is the process of preparing or reserving the fresh vegetable for market. If a product were cooked it would include more than first processing. Stated otherwise, cooking goes over and beyond what the courts have determined to be first processing.

McComb vs. Hunt Foods, 167 Fed. (2) 905 at 907:

“Was appellee engaged in ‘first processing’ within the meaning of the statute? The word ‘process’ by definition means a series of acts, and the test of when ‘first processing’ ends is obviously not when the first act performed upon the fruit is done (it might well be first processed’ by a preliminary washing of the apples if this view was sound). A more rational view suggests the conclusion that the sum of several operations may well constitute a ‘process’ or ‘processing’. The cutting and peeling admittedly does not end the first processing of the major part of the apple which is later dehydrated, yet appellant maintains that the first processing (so far as the peels and cores are concerned) has ended at this point, while these parts of the apples have in fact not yet been ‘processed’ in any manner and have yet to be converted into juice or pomace. This argument does not appeal to us.”

Hendricks vs. DiGiorgio Fruit Co., 49 Fed. Sup. 73: (575)

“If ‘first processing’ does not mean the processing that first results in a marketable product, where is the line to be drawn? It is true that the wine or brandy making process may be broken down

into component processes or operations, and that these, in turn, may be broken down still further. But the same thing is true of any other process, as, for example, the production of dried and frozen fruits and vegetables, condensed, evaporated and dried milk, butter, cheese, dried eggs, and flour, all of which, the Administration has held, fall within the exemption. Obviously, first processing does not end at some arbitrarily chosen point in the midst of the wine or brandy making process, any more than it ends at such a point in the cheese making process. The stipulated facts show that when the crushing season starts defendant's operations are a continuous processing of the fresh grapes that cannot be halted at any point prior to completion. To choose one of the early steps in such continuous process and say this and no more constitutes first processing would be arbitrary and unwarranted."

In *Mitchell vs. Oregon Frozen Foods Company*, 145 Fed. Sup. 157, it was conceded by the Government that these same french fried potatoes were included in "first processing". The exception involved was Section 213 (a) (10) of the Fair Labor Standards Act of 1938, 29 USCA 201 et seq.

"Any individual * * * engaged in * * * preparing in their raw or natural state * * * agricultural or horticultural commodities for market."

If the potatoes were being "prepared in their raw or natural state" they certainly were not a "cooked food."

The Oregon Frozen Foods Case is, however, presently on appeal, but this point is not involved in the appeal, as the Government conceded that these french fried potatoes were exempt under this "first processing" clause.

Substantial Identity

The controlling factor in the question is whether or not a product loses its substantial identity in the process. In other words, is the product substantially the same product that it was at the beginning. Otherwise stated, does the product change from the original product into some different product?

In *East Texas Motor Freight Lines vs. Frozen Food Express*, 100 L. ed. 917 the Court dealt with "substantial identity" saying: (924 L. ed. cit.)

"A chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a 'manufactured' commodity.

At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of §203 (b) (6)."

This was followed in *Home Transfer & Storage Co.*

vs. United States, 141 Fed. Sup. 599, which included the same general process that we are dealing with here. The Court said: (602)

“The processing of fresh fruits for quick freezing in this case is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. Nothing but slicing of the fruit affects its physical form. The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing. Although this process may produce noticeable discoloration, or may divide a stalky variety into two or more parts, nothing is done to otherwise change the form of the vegetables. In other respects than those mentioned, these processed fruits and vegetables remain essentially in the same shape and form as non-processed fruits and vegetables.

Such results of the processing here make applicable to the facts of this case the above quoted Supreme Court statement in its April 23, 1956 decision that:

‘But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been ‘manufactured’ within the meaning of §203 (b) (6).’ ”

Counsel cite the case before the Interstate Commerce Commission of *W. W. Hughes Extension-Frozen Foods*, M.C. 105783 Sub. (3) wherein the Com-

mission held certain items to be manufactured. The list includes frozen french fried potatoes, frozen eggs, frozen egg yolks, etc.

However, the last expression of any court on this question that we have discovered is *Frozen Food Express vs. United States*, 148 Fed. Sup. 399 (Dec. 1956). That was an action to restrain the Commission from enforcing its report defining certain items being manufactured. The list included among others frozen whole eggs, dried egg powder, dried egg yolks, fruits and vegetables (quick frozen). In holding the items we enumerate along with many others as not being manufactured, the court said at page 402-3:

“Our holding that fresh and frozen dressed poultry was exempt was affirmed, 351 U. S. 49, 76 S. Ct. 574, 577, wherein the Supreme Court announced the so-called ‘continuing substantial identity’ test, quoting from *Anheuser-Busch Brewing Ass’n v. U.S.* 207 U.S. 556, at page 562, 28 S. Ct. 204, 52 L. Ed. 336:

“ * * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012. There must be transformation; a new and different article must emerge, ‘having a distinctive name, character, or use.’ ”

* * *

“With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packed, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scari-fied; redried tobacco leaves.”

Those items that do lose their continuing substantial identity were: Commercial creamery products including cottage cheese, cream cheese and butter; cottonseed meal, canned fruits and vegetables, condensed milk.

Butter, cream cheese and cottage cheese cannot be identified as milk but frozen french fried potatoes certainly can be identified as potatoes.

A frozen french fry is identified as the original product, it has acquired no new “identity” has no “new properties” and is not devoted to any or different uses than its original principal ingredient. If these potatoes were converted or manufactured into

potato starch, or if the corn was made into corn-starch, then they would lose their substantial identity. But here we have a potato that is sliced, blanched (to kill enzymes) and frozen and as such retains its substantial identity.

Killing enzymes is not cooking.

Water blanching for a minute and one-half is not sufficient to kill the enzymes and it is necessary to blanch them in water longer or to blanch them in oil to kill the enzymes. Paragraph XI of the Pre-Trial Order states that the purpose of oil blanching "was to kill the enzymes in the raw potato and to stop bacterial decay." (R. 13 and 14) Mr. Gheen testified "The purpose of blanching is to inactivate the enzymes" (R. 34) and "the only other purpose would be to coat the product with oil." (R. 35)

Comparison of french fries with other products of Appellee.

It is interesting to note that all other vegetables processed at Appellee's plant are classified under Item 4715 of the tariff. (R. 40) They include corn, carrots, lima beans, string beans, and potatoes in various forms, i.e., french cuts, potato patties, diced potatoes. (R. 40 and 34)

They all go through the same general processing. (R. 33) The only difference is the time of blanching and the medium. Some vegetables take a longer time than

others. Where oil is used as a blanching agent the water blanch timing is shortened.

Definition of words under Tariff Item 4600 and 4715.

Appellant quotes Webster's New International Dictionary for a definition of "cook".

"Made suitable for eating." (Ap. Br. 11)

The testimony is: "This product, if you took a package out and simply thawed it out to get rid of the freezing would it be a palatable product? A Well, yes and not. You could swallow it, but it is not healthy so to do." (R. 36) Certainly it would not be "suitable for eating."

As to "curing" the same dictionary says to preserve by drying, salting, etc. (Ap. Br. 12) It takes no citation of authorities to establish that these french fried potatoes are not "cured". This would apply to salt pork, jerked venison or smoked hams or bacon.

As to "preserve" the dictionary says: "To save from decomposition by freezing." By definition frozen vegetables come under Item 4715 so that portion of the definition is not indicative of Item 4600. The balance of the definition is "curing or treating with a preservative."

"Curing" already is eliminated under the above and there is no testimony that any "preservative" is added to the potatoes.

The oil blanch is not a preservative and is not used for that purpose. Its purpose is to kill the enzymes

and to furnish the oil that expedites the cooking of the potatoes when the user receives them. It avoids the necessity of adding oil if baked in the oven and cuts down on the oil required in the deep fat fryer of the housewife or restaurant cook.

Under Webster's definition these potatoes are neither "made suitable for eating", "cured", or "preserved".

Turning now to the language of Item 4715 first the product is a vegetable. It is either cooked or it is fresh. All other vegetables processed by Appellee are classified as frozen fresh vegetables. If a frozen french cut is a frozen fresh vegetable and that is admitted, then a frozen french fry is a fresh vegetable. The french cut is not cooked and the housewife follows the same cooking instructions if the deep fat fry method is used. If the oven method is used, the first two or three minutes is necessary to defrost and warm the potato, the rest of the 10 to 25 minutes is for cooking the potato. (R. 36)

Comparing the cooking time of the oil blanched potato with other frozen products shipped under Item 4715 we find mixed vegetables require 15 to 18 minutes, the potato patty from 10 to 25 minutes, kernel corn 6 to 8 minutes. Obviously the frozen oil blanches, or what is commonly called french fry, must be cooked by the housewife before it is made "suitable for eating" or before it is "cooked". If it is not a "cooked food" it cannot be classified under Item 4600.

Appellant attempts to limit the significance of the cases dealing with "raw or natural state" by stating that the reasons for those rulings are not present in this case. This is answered by the long line of cases establishing the preferred position of the shipper as against the carrier, i.e., shipper entitled to the lower of two equally applicable rates, doubts or ambiguities resolved in favor of shipper, the more specific rate controls the more general. We also feel that farm products should command a lower rate than "cooked foods". All the reasons set forth in the Fair Labor Standards cases and the Motor Freight cases apply with a particular vigor here. Why should oil blanched potatoes be required to bear a higher rate than other products handled in the same identical manner by the carrier? There is no logical distinction.

SPECIFICATION OF ERROR II

Summary of Argument

1. Invoking the doctrine of primary jurisdiction is discretionary.
2. Where there is no dispute as to the facts there is no occasion to invoke the doctrine.
3. Where there is no trade term or technical language used there is no occasion to invoke the doctrine.
4. The admission of testimony ipso facto does not require or indicate that the doctrine be invoked.

5. Interstate Commerce Commission possesses no better means, method, or knowledge to determine the question than the Court does.

6. Many courts have dealt directly with much more complicated and technical questions than are presented here and decided the issue without invoking the doctrine.

AUTHORITIES

Texas & P. R. Co. vs. Abilene Cotton Oil Co.
(1906) 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553.

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co. 133 Fed. Sup. 680.

Great Northern R. Co. vs. Merchants Elevator Co. (1922) 259 U. S. 285 (290, 291, 292) 66 L. E. 943

United States vs. Western P. R. Co., 1 L. Ed. (2) 126 (Vol. 1 U. S. Adv. Sh. Dec. 17, 1956)

United States vs. Chesapeake and Ohio R. Co. 352 U.S. 1 L. Ed. (2) 140 (Adv. Sh.) 77 S. Ct.

Norge Corp. v. Long Island R. Co., 77 Fed. (2) 312

ARGUMENT

This specification involves the question of whether or not this is an appropriate case to invoke the doctrine of primary jurisdiction.

Otherwise stated, is there such a controversy over the facts, or is the question so highly technical, that it would be advisable to refer the question to the Interstate Commerce Commission for examination,

hearing, and determination. Or, should the trial court hear the cause in the first instance and make its own determination.

The doctrine had its genesis in *Texas & P. R. Co. vs. Abilene Cotton Oil Co.* (1906) 204 U. S. 426, 27 St. Ct. 350, 51 L. Ed. 553.

It was an action in a state court to recover alleged overcharges on the ground the charges were excessive, unreasonable and unjust. The rates had been published under the provisions of the Interstate Commerce Act. Mr. Justice White said: (p. 562 L. Ed)

“Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.”

It has been cited, followed and distinguished in a great number of cases since 1906 down to 1954 in *Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co.*, 133 Fed. Sup. 680, where the court referring to *Texas & P. R. Co. vs. Abilene Cotton Oil Co.* said at page 690:

“The court in that case established the so-called ‘primary jurisdiction’ doctrine, which has been referred to as an excellent example of judicial

legislation (Davis on Administrative Law, page 665, 1951), holding that a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the Act and had not been found to be unreasonable by the Interstate Commerce Commission."

Great Northern R. Co. vs. Merchants Elevator Co. (1922) 259 U. S. 285, 291, 292. In a suit to recover alleged overcharges Mr. Justice Brandies in speaking of the necessity of invoking the doctrine of primary jurisdiction said: (66 L. Ed. 946)

"This argument (for uniformity) is unsound.

* * *

Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. * * *

Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to

be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.”

And at page 948:

“In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary.”

These cases reveal that the use of the doctrine is discretionary and only when it serves a good purpose. It certainly is not mandatory or it would necessarily be used in all similar cases. *United States vs. Western P. R. Co.*, 1 L. Ed. (2) 126 at 135: (Vol. 1 U. S. Ad. Sh. Dec. 17, 1956)

“By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in *Great Northern R. Co. vs. Merchants Elevator Co.* (US) *supra*, which call for decision based on the particular facts of each case.”

As appellant points out in a number of instances there is no dispute as to the facts. The railroad did not introduce any rebuttal testimony and all testimony stands undenied. Under such circumstances it is the province of the court to interpret the language of the tariff as it would the language of any statute.

There seems to be some implication that if no testimony is received then the doctrine of primary jurisdiction is not appropriate but if any testimony is introduced it immediately becomes necessary to suspend the trial and refer the matter to the Interstate Commerce Commission. We do not so read the cases. It is only where there are contested issues of fact, highly technical matters of science or rate making, or the peculiar usages of trade or locality that the doctrine is invoked. Certainly none of these elements were present in the case under consideration.

The short testimony here was of the same nature as was introduced in *West Coast Products Corp. vs. Southern Pacific*, 226 Fed. (2) 830 (9th Circuit May, 1955). That also was an action by the railroad to recover claimed additional freight charges. It involved simply the question of which of two items of a freight tariff was applicable to the shipment of certain olives. The testimony was all uncontradicted and described the method of processing the olives. The court did not invoke the doctrine but decided it as a matter of law after withdrawing the issue from

the jury. The similarity between these two cases is striking.

United States vs. Western Pac. R. Co. 77 S. Ct. 161, 1 L. Ed. (2) 126. This is a striking example of where the doctrine should be applied and where it should not be applied. There is a vast difference between an incendiary bomb and a potato. None of the intricate questions involved there are present in this case. This case presents only questions of common ordinary everyday matters. It does not require a body of experts in transportation to determine when a potato is cooked. Every housewife in the land knows that.

The Court said: (132)

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”

In the very recent case of *U. S. vs. Chesapeake & Ohio R. Co.*, 352, U. S., 1 L. Ed. (2) 140 (Adv. Sh.) 77 S. Ct. which was decided the same day as the *Western Pacific* case, 1 L. Ed. (2) 126 the court said at p. 142 of the L. Ed. Cit.

“Hence we face the same question as the one we have dealt with in the *Western Pacific Case*, *supra*, namely: Does the issue of tariff construc-

tion, which the Court of Appeals regarded as one for the court, involve such acquaintance with rate-making and transportation factors as to make the issue initially one for the Interstate Commerce Commission, under the doctrine of primary jurisdiction?"

We submit that the factors there involved are not here, i.e., "such acquaintance with rate making and transportation factors." Our sole question is to determine whether the potatoes are "cooked food" or "vegetables, fresh, frozen."

As pointed out in Appellant's brief the courts have dealt with other situations involving much more complicated and technical items than we are dealing with here, without invoking the doctrine of primary jurisdiction. (App. Br. 28-29)

In the *Norge Corp. vs. Long Island R. Co.* case, 77 Fed. (2) 312, cited by Appellant, the court also said at p. 314:

"It is only where words of the tariff have an ordinary meaning only, and are employed in that sense so that their interpretation is solely a question of law, involving no issue of fact, that a court has jurisdiction in the first instance. (citing)

In *Great Northern Ry. Co. vs. Merchants' Elevator Co.*, supra, the court held that if the construction of the tariff presented solely a question of law, the court had jurisdiction, but if it involved a question of fact or of discretion in technical matters, the Commission had exclusive jurisdiction."

We wish to emphasize, what so many courts say, "where there is no issue of facts to be determined" there is no need to refer the matter to the Interstate Commerce Commission.

CONCLUSION

We respectfully submit that the trial court's judgment should be sustained for the reason that its Findings of Fact are well supported by satisfactory evidence, and that they should not be reversed except for clear showing of error, that the Findings entered are clear and convincing and the only logical conclusion to be drawn from the Agreed Facts and the amplifying testimony. That this is not an appropriate case to invoke the doctrine of primary jurisdiction for the reason we are dealing with a common, ordinary commodity and the Court will take judicial notice of the nature and use of the product. The most compelling reason is the fact that these potatoes must be cooked before they are served by the housewife or the institutional user.

We believe the evidence, the facts, and the law are clear in this case and following the authorities cited the judgment should be affirmed.

Respectfully submitted,
MARTIN P. GALLAGHER,
Attorney for Appellee.

No. 15582

United States
Court of Appeals
for the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY, a
corporation, Appellant,
vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

AUG - 5 1957

PAUL P O'BRIEN, CLERK



No. 15582

United States
Court of Appeals
for the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY, a
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellant.

MARTIN P. GALLAGHER,

P. O. Box 117,
Ontario, Oregon,

For Appellee.

United States District Court
District of Oregon

Civil Action No. 8429

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant.

COMPLAINT

For cause of action against defendant, plaintiff alleges:

I.

Jurisdiction of this Court in this action is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and Acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is a corporation incorporated under laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate

Commerce Act (Title 49 USCA, Sections 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon, and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern Districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 50 carload shipments of frozen foods and vegetables with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954.

V.

The lawful tariffs of the plaintiff and said other connecting common carriers by railroad, involved in the transportation of such shipments from Ontario, Oregon, to such destinations, provided that charges of \$61,934.38 be made by said rail carriers for such transportation service and other charges incidental thereto, which sum the defendant became obligated to pay to the plaintiff upon acceptance of such shipments by the plaintiff for transportation. The defendant has paid to the plaintiff a total sum of \$56,047.81 toward such charges, leaving a balance of \$5,886.57, together with Federal transportation tax on such balance, amounting to \$176.90, or a total sum of \$6,063.47, unpaid and owing from the defendant to the plaintiff; but, notwithstanding repeated demands by the plaintiff for payment thereof, the defendant has failed, neglected and refused, and still refuses, to pay said sum of \$6,063.47, or any part thereof; and said sum of \$6,063.47 is now due and owing from the defendant to the plaintiff.

Wherefore, plaintiff seeks judgment against defendant in the sum of \$6,063.47, together with its costs and disbursements herein incurred.

/s/ ROY F. SHIELDS,

/s/ JOSEPH G. BERKSHIRE,

Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1956.

[Title of District Court and Cause.]

ANSWER

Defendant admits the allegations of the Complaint, except those stated in Paragraph No. V and those it denies except it admits it has not paid the plaintiff the sum of \$6063.47.

By way of counterclaim against the plaintiff, defendant alleges:

I.

Jurisdiction of this Court in this counter-claim is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and Acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is a corporation incorporated under laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, Sections 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and, subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon, and various desti-

nations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern Districts of the United States for distribution and sale.

IV.

Commencing on or about March 13, 1954, and continuing until on or about April 28, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 69 car-load shipments of frozen foods and vegetables with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern Districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by defendant. The first of said shipments was so delivered on or about March 20, 1954.

V.

The lawful tariffs of the plaintiff and said other connecting common carriers by railroad involved in the transportation of such shipments from Ontario, Oregon, to such destinations provided for

charges of \$26,583.08 be made by said railroad carriers for such transportation services and other charges incidental thereto. That the plaintiff erroneously charged the defendant for such shipments a total of \$32,562.13 notwithstanding the proper charges were the sum of \$26,583.08, leaving an overpayment in the sum of \$5979.05. That the defendant has demanded repayment of these overcharges from the plaintiff and there is now due, owing and unpaid from the plaintiff to the defendant the sum of \$5979.05 which the plaintiff has failed, neglected and refused and still refuses to pay.

Wherefore, defendant prays that the plaintiff take nothing by way of its Complaint and that defendant have Judgement against the plaintiff for the sum of \$5979.05 together with its costs and disbursements herein incurred.

/s/ P. J. GALLAGHER,
/s/ MARTIN P. GALLAGHER,
Attorneys for Defendant.

CERTIFICATE OF SERVICE

State of Oregon
County of Malheur—ss.

I hereby certify that on this date I served the within paper upon Randall Kester, one of attorneys for plaintiff, by depositing in the United States Post Office at Ontario, Oregon, a correct copy of the whole thereof in a sealed envelope with postage prepaid addressed to him at his regular

office address at 727 Pittock Block, Portland 5, Oregon.

Dated at Ontario, Oregon, March 29, 1956.

/s/ MARTIN P. GALLAGHER

Of Attorneys for Defendant.

[Endorsed]: Filed April 9, 1956.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now the plaintiff and for its Reply to the alleged Counterclaim asserted by the defendant in this action, admits, denies and alleges as follows:

First Defense

1. Admits the allegations contained in paragraphs I, II, III and IV of said alleged Counterclaim.

2. Plaintiff denies each and all of the allegations contained in paragraph V of said alleged Counterclaim.

Second Defense

For its further and separate answer and affirmative defense to said alleged Counterclaim:

I.

Plaintiff alleges that the shipments contained in cars Nos. PFE 200481, PFE 200573, PFE 200040, PFE 200004, PFE 200699 and PFE 200663 were delivered to their consignees prior to April 9, 1954, and that the defendant's claims for alleged overcharges on said shipments have been barred by the statute of limitations.

II.

Plaintiff alleges that as to the balance of the shipments set forth in defendant's alleged Counterclaim, the charges collected by the plaintiff amounted to \$30,367.96, which were the full, true and lawful charges applicable to said shipments under the tariffs of the plaintiff and its connecting carriers.

Wherefore, having replied to the defendant's alleged Counterclaim herein, plaintiff prays that said Counterclaim be denied and that the plaintiff have judgment against the defendant for the full amount of \$6,063.47, together with its costs and disbursements herein incurred, as prayed for in its Complaint herein.

/s/ ROY F. SHIELDS,

/s/ JOSEPH G. BERKSHIRE,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Agreed Facts

I.

Jurisdiction of this Court in this action is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and

2), and acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under the laws of the State of Utah, and defendant was and now is a corporation incorporated under the laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, §1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 car-load shipments of frozen foods and vegetables including frozen potatoes with directions that each of

such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954.

V.

Trans-Continental Freight Bureau Freight Tariff 2 series and supplements thereto effective between January 6, 1954 and October 2, 1955, prescribed general commodity rates and charges for the transportation of various commodities, eastbound from points in Oregon to points in Eastern, Middle Western and Southern districts.

VI.

Item 4600 of said tariffs described in Paragraph V hereof prescribes carload rates on "food cooked, cured or preserved, frozen NOIBN in containers in boxes." The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed by Name".

VII.

Item 4715 of said tariffs described in Paragraph V hereof prescribes carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened), in

packages as prescribed in Western Classification (Subject to Notes 1 and 6).” Said Notes 1 and 6 do not affect the issue in this action and are accordingly not set forth.

VIII.

The correct charges for those portions of the shipments described in Paragraph IV hereof consisting of frozen potatoes computed in accordance with Item 4600 of said tariffs, including the Federal transportation tax thereon, total the amount of \$67,579.27.

IX.

The correct charges for those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes computed in accordance with Item 4715 of said tariffs, including the Federal transportation tax thereon, total the amount of \$56,011.18.

X.

The amounts paid by defendant to plaintiff as charges due on those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes, including the Federal transportation tax thereon, totaled \$61,342.41.

XI.

The potatoes referred to above were hauled from farmers’ fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

The oil blanching consisted of immersing the sliced potatoes in blanching oil at 350° F for one

and one-half minutes. They were partially browned by the oil blanching. They were cooled and quick-frozen to a temperature of -15° to -20° F, packaged, labeled, and stored in zero storage. They were shipped in refrigerated cars of the plaintiff. The purpose of blanching was to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing was to prevent spoilage and to preserve potatoes in a fresh condition.

Plaintiff's Contentions

I.

That the process described in Paragraph XI of the Agreed Facts involves the preparation of potatoes for consumption by the action of heat and renders the product a "food cooked, cured or preserved", within the meaning of Item 4600 of said tariffs described in paragraph V of the Agreed Facts.

II.

That by reason of the Agreed Facts hereinabove set forth the plaintiff is entitled to recover from the defendant as undercharges, including the Federal transportation tax, on the shipments described in Paragraph IV of the Agreed Facts the sum of \$6,236.86.

Defendant's Contentions

I.

That the process described in Paragraph XI of the Agreed Facts involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI of the

Agreed Facts, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs described in Paragraph V of the Agreed Facts as cooked foods.

II.

That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.

III.

That by reason of the Agreed Facts hereinabove set forth the defendant is entitled to receive from plaintiff as overcharges, including the Federal transportation tax on the shipments described in Paragraph IV of the Agreed Facts, the sum of \$5,331.24.

Issues to Be Determined

Were the potatoes which constitute the shipments described in Paragraph IV of the Agreed Facts "food cooked" as classified in Item 4600 of the tariffs described in Paragraph V of the Agreed Facts, or were said potatoes "vegetables, fresh" as classified in Item 4715 of said tariffs.

Dated this 13th day of February, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Plaintiff.

/s/ P. J. GALLAGHER,

/s/ MARTIN P. GALLAGHER,

Attorneys for Defendant.

The above Pre-Trial Order is approved and Issues for trial will be as herein settled. There will be no amendment to the Pre-Trial Order without the approval of the Court.

Dated this 13th day of February, 1957.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now plaintiff and moves the court for a summary judgment herein in favor of the plaintiff on the ground and for the reason that the pre-trial order agreed to by the parties and submitted to this court shows that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

This motion is based upon Rule 56, Federal Rules of Procedure, and in the opinion of the undersigned, is well founded in law and the same is not made for the purposes of delay.

/s/ ROY F. SHIELDS, H.E.R.

/s/ HOWARD E. ROOS,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 11, 1957.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

The defendant may submit Findings in defendant's favor.

Dated March 14, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on regularly at this time for Findings of Fact and Conclusions of Law, the Court makes the following:

Findings of Fact

I.

Jurisdiction of this Court in this action is found upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is

a corporation incorporated under the laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, Sec. 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 car-load shipments of frozen foods and vegetables including frozen potatoes with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad

duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954. That the shipments on which defendant bases its counter-claim were made between April 9, 1954, and April 28, 1955.

V.

Trans-Continental Freight Bureau Freight Tariff 2 series and supplements thereto effective between January 6, 1954 and October 2, 1955, prescribed general commodity rates and charges for the transportation of various commodities, eastbound from points in Oregon to points in Eastern, Middle Western and Southern districts.

VI.

Item 4600 of said tariffs described in Paragraph V hereof prescribes carload rates on "food cooked, cured or preserved, frozen NOIBN in containers in boxes." The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed by Name."

VII.

Item 4715 of said tariffs described in Paragraph V hereof prescribes carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened), in packages as prescribed in Western Classification (Subject to Notes 1 and 6)." Said Notes 1 and 6 do not affect the issue in this action and are accordingly not set forth.

VIII.

The correct charges for those portions of the shipments described in Paragraph IV hereof consisting of frozen potatoes as computed in accordance with Item 4600 of said tariffs, including the Federal transportation tax thereon, total the amount of \$67,579.27.

IX.

The correct charges for those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes computed in accordance with Item 4715 of said tariffs, including the Federal transportation tax thereon, total the amount of \$56,011.18.

X.

The amounts paid by defendant to plaintiff as charges due on those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes, including the Federal transportation tax thereon, totaled \$61,342.41.

XI.

The potatoes are hauled from farmers' fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

The oil blanching consists of immersing the sliced potatoes in blanching oil at 350° F for one and one-half minutes. They are partially browned by the oil blanching. They are cooled and quick-frozen to a temperature of —15° to —20° F, packaged, labeled, and stored in zero storage. They are shipped in refrigerated cars of the plaintiff. One purpose

of blanching is to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing is to prevent spoilage and to preserve potatoes in a fresh condition.

XII.

That the potatoes herein do not lose their substantial identity in the process described in Par. XI above and are frozen fresh vegetables.

That the potatoes are not a frozen cooked food.

Based upon the above Findings of Fact the Court makes the following:

Conclusions of Law

I.

That the process described in Paragraph XI above involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI above, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs described in Paragraph V of the Agreed Facts as cooked foods.

II.

That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.

III.

That by reason of the above the defendant is entitled to recover from plaintiff as overcharges, including the Federal transportation tax on the

Dated at Portland, Oregon, March 18th, 1957.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Union Pacific Railroad Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 18th day of March, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant Union
Pacific Railroad Company.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the plaintiff, Union Pacific Railroad Company, a corporation, in the above entitled and numbered cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment and the whole thereof, and each and every part thereof, made and entered in the above Court and cause on or about the 18th day of

March, 1957, in favor of the defendant and against the plaintiff, and providing as follows, to-wit:

“It Is Hereby Ordered that the defendant Ore-Ida Potato Products, Inc. be and it hereby is granted judgment against the plaintiff Union Pacific Railroad Company in the sum of Five Thousand Three Hundred Thirty - one and 24/100 Dollars (\$5,331.24) together with interest thereon from April 28, 1955, at the rate of six (6%) per cent per annum and that execution issue.

“Dated at Portland, Oregon, March 18, 1957.
/s/ Claude McColloch, District Judge”

Now, Therefore, in consideration of the premises and of such appeal, we the said plaintiff and appellant herein and Continental Casualty Company, a corporation organized and existing under the laws of the State of Illinois, do hereby jointly and severally undertake and agree, on the part of said plaintiff-appellant that said plaintiff-appellant will pay all damages, costs, interest, damages for delay, and disbursements which may be awarded against it on said appeal.

And Whereas, the plaintiff-appellant is desirous of staying execution of the judgment so appealed from, we do further in consideration thereof jointly and severally undertake and agree that if said judgment appealed from or any part thereof be affirmed, the said plaintiff-appellant, Union Pacific Railroad Company, a corporation, will satisfy the same so far as affirmed.

Done at Portland, Oregon, this 12th day of April,
1957.

UNION PACIFIC RAILROAD
COMPANY, a corporation,

/s/ By ROY F. SHIELDS,

Of Its Attorneys, Principal, and

[Seal] CONTINENTAL CASUALTY
COMPANY,

/s/ By H. F. WESTENFELDER,

Attorney in Fact.

Countersigned:

[Seal] TATE, WESTENFELDER & BERG,
INC.,

Resident Agent,

/s/ By H. F. WESTENFELDER.

April 17th, 1957.

/s/ CLAUDE McCOLLOCH.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 17, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

On motion of plaintiff-appellant, and good cause
appearing therefor, it is

Ordered that the Clerk of this Court forward to
the United States Court of Appeals for the Ninth
Circuit in connection with the appeal of this cause
the original papers, including Exhibits 1 and 2,
which have been designated by the plaintiff-

appellant for inclusion in the record on appeal, in accordance with the usual practice of this Court in regard to the safekeeping and transportation of such papers and exhibits.

Done in open Court this 17th day of April, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 17, 1957.

[Title of District Court and Cause.]

ORDER AMENDING ORDER FOR
TRANSMITTAL OF EXHIBITS

On motion of plaintiff-appellant, and good cause appearing therefor, it is

Ordered that the directory provision of the order of this Court in the above-entitled action dated April 17, 1957 be amended to read as follows:

“Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit in connection with the appeal of this cause the original papers, including Exhibits 4 and 5, which have been designated by the plaintiff-appellant for inclusion in the record on appeal, in accordance with the usual practice of this Court in regard to the safekeeping and transportation of such papers and exhibits.”

Done in open Court this 14th day of June, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

1956: DOCKET ENTRIES

Jan. 17—Filed complaint.

17—Filed and entered order appointing person to make service.

17—Mailed summons to John C. Elfering, Vale, Oregon, for service.

Feb. 6—Filed summons with return.

10—Filed stipulation.

10—Filed motion.

10—Filed and entered order extending time for defendant to appear 60 days.

Apr. 9—Filed answer, and certificate of service.

9—Filed defendant's request for jury trial.

20—Filed motion.

20—Filed and entered order extending time for filing of reply to May 31, 1956.

May 31—Filed reply to counterclaim.

Nov. 3—Entered order setting for Pre-Trial Conference January 7, 1957.

1957:

Jan. 7—Lodged Pre-Trial order.

17—Entered order setting for trial on February 12th.

Feb. 5—Entered order resetting for trial on February 13th, 1957.

11—Filed Motion for Summary Judgment.

13—Entered order denying above motion.

13—Record of Hearing by court (trial)—entered order that all briefs be filed before March 11th.

13—Filed Pre-Trial Order.

1957:

Mar. 4—Filed defendant's memorandum.

11—Filed plaintiff's reply memorandum.

11—Filed plaintiff's supplemental memorandum.

11—Filed defendant's reply brief.

14—Filed Memorandum of Decision. Defendant to submit findings in its favor.

18—Filed and entered Findings of Fact and Conclusion of Law.

18—Filed and entered Judgment.

Apr. 15—Filed notice of appeal by plaintiff.

16—Filed designation of record on appeal.

16—Filed statement of points.

16—Filed affidavit of service.

16—Filed motion for transmittal of exhibits to Court of Appeals.

17—Filed and entered order to transmit exhibits to Court of Appeals.

17—Filed supersedeas bond on appeal.

24—Filed defendant's additional designation of record on appeal.

May 15—Filed transcript of proceedings.

17—Filed motion to extend time to docket appeal in Court of Appeals.

17—Filed amendment to designation of record on appeal.

17—Filed affidavit of service of motion and amended designation.

20—Filed and entered Order extending time to file appeal to June 14, 1957.

June 6—Filed appellant's supplemental statement of points.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America

District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Certificate of service and answer; Reply to counterclaim; Pre-trial order; Motion for summary judgment; Memorandum of decision; Findings of fact and conclusions of law; Judgment; Notice of appeal; Statement of points; Supersedeas bond on appeal; Designation of record on appeal; Order for transmittal of exhibits; Amendment to designation of record on appeal; Appellant's supplemental statement of points; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8429, in which Union Pacific Railroad Company, a corporation, is the plaintiff and appellant and Ore-Ida Potato Products, Inc., a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, together with Exhibits 4 and 5.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of June, 1957.

[Seal] R. DE MOTT,
 Clerk,
 /s/ By THORA LUND,
 Deputy.

United States District Court
District of Oregon

No. Civil 8429

UNION PACIFIC RAILROAD COMPANY, a
 corporation, Plaintiff,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
 poration, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, February 13, 1957.

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Mr. Howard E. Roos, of Attorneys
for Plaintiff; Mr. Martin P. Gallagher, of Attor-
neys for Defendant.

The Court: Union Pacific vs. Idaho Potato. I
have read the file. Is there any oral testimony?

Mr. Gallagher: Yes, there is some oral testimony,
your Honor.

The Court: All right. Put it on.

Mr. Roos: If your Honor please, I have a brief [1]* to submit on a motion for summary judgment.

The Court: Yes.

Mr. Roos: We have taken the position that this is a question of law for the Court only. Would you care to hear argument on it right now?

The Court: Have you any oral testimony?

Mr. Roos: We have none, and we had hoped to exclude it.

The Court: What?

Mr. Roos: I say, we had hoped to exclude any oral testimony.

The Court: You don't have any to offer at this time?

Mr. Roos: We have none ourselves, and we feel that no oral testimony is warranted.

The Court: I understand. There is no law that keeps them from putting on testimony. All right. Put on your testimony, Mr. Gallagher. [2]

EVAN GHEEN, JR.

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gallagher): Mr. Gheen, you work for the defendant, Idaho Potato Products Corporation?

A. Yes, I do.

Q. In what capacity?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Evan Gheen, Jr.)

A. My title is Assistant Sales Manager, and I have other duties relating to quality control and traffic.

Q. Ore-Ida Potato Products is located in Ontario, Oregon, is it not? A. That is correct.

Q. Tell me what products do they process there?

A. We process potatoes and corn and occasionally carrots, and we have a packaging operation on mixed vegetables.

Q. Generally, it is a quick-freezing plant for fresh vegetables?

A. A food processing and quick-freezing plant.

Q. Do you also handle stringbeans, lima beans and the mixed vegetable field? A. Yes, we do.

Q. Can you describe to the Court the process by which these particular products, lima beans, stringbeans, carrots [3] and potatoes are processed? Start in with the bringing of the product into the plant and the washing.

A. Would you repeat the question?

Q. Could you describe to us the process that is used in the plant for the fresh vegetables?

A. Any particular fresh vegetables, though?

Q. Any of them.

A. The product is brought to the plant from the grower's field, is weighed, washed, peeled, if necessary, and specked, as we think of it in cleaning up the product, and is blanched, inspected, given an additional washing and drying when necessary, and frozen and packaged. Sometimes that is reversed—packaged and frozen.

(Testimony of Evan Gheen, Jr.)

Q. Now, you speak of blanching. What is blanching?

A. The process of blanching is necessary in the preservation of food. You apply heat to the product by means of hot water or steam to inactivate the enzymes which contribute to the decomposition of the food if they are active.

Q. In an item such as corn and carrots how long does the blanching process take for the purpose of killing enzymes?

A. May I refer to my notes?

Q. Yes, if you have some.

A. Cob corn, for example, would be blanched between seven and nine minutes at a temperature of 204 degrees. Cobbed corn would be blanched three and a half to four minutes at [4] a temperature of 204 degrees. Peas would be blanched up to three minutes at a temperature of 204 degrees.

Q. Then are they frozen after blanching?

A. Shortly after blanching, yes.

Q. And then stored and packaged or packaged and stored?

A. Yes.

Q. Now, in the case of potatoes, which we are dealing with here, can you describe in some detail the precise process of handling potatoes?

A. Yes. The potatoes go through much the same process as other frozen foods. They are brought from the grower's field to the plant, are weighed and passed through a washer and a lye bath process.

Q. Excuse me. Would you repeat that?

A. The potatoes are brought from the grower's field to the plant, are weighed and passed through

(Testimony of Evan Gheen, Jr.)

a lye bath process which loosens the skin. They go from there to a specking table, where the ladies trim the eyes out, and such as that—any bad spots. They pass through a cutting machine into the blanchers, where they are water-blanced at a temperature of 190 degrees for a period of one minute plus or minus five seconds. They pass into an oil blanch, which is at approximately 350 degrees, but it may vary upward or downward, for a period ranging from one minute to a minute and 30 seconds, following which they pass through a drier, or something that [5] blows on them, into the deep freeze, following which they are packaged and stored.

Q. Now those are the French fries?

A. That is correct.

Q. Other potato products are potato patties and cubes; is that correct?

A. French cuts, patties and cubes.

Q. Now, is the process relative to them the same except for the oil blanching?

A. The process of oil-blanching is converted over into a water blanch. In other words, you increase the water-blanch time in an amount equivalent to the oil-blanch time.

Q. Those that do not have an oil blanch have a longer water blanch?

A. It is necessary to have—the answer is Yes.

Q. What is the purpose of blanching?

A. The purpose of blanching is to inactivate the enzymes.

(Testimony of Evan Gheen, Jr.)

Q. Is that accomplished in a longer water blanch and is it also accomplished in a shorter water blanch plus the oil blanch?

A. That is correct.

Q. Is there any other purpose in oil-blanching?

A. The only other purpose would be to coat the product with oil.

Q. Why is that desirable? [6]

A. Because the customer wants us to coat it with oil, as we can do it cheaper than he can.

Q. Is there any advantage relative to shipping?

A. There is an advantage both in the freezing and in shipping. If you don't coat it in oil, the product sometimes sticks together so that the shipper would have difficulty in separating the individual pieces. At the same time, it can be done. I wouldn't say that there is an advantage in shipping, no.

Q. Then after the oil blanching they are then frozen and then shipped? A. Yes.

Q. Now what is the method of preparation of the French fries by the ultimate consumer, either the housewife or the institutional user?

A. The institutional user will take out a case of French fries prior to the use of them and allow them to thaw for a period of time, following which he introduces them into his fryer and cooks them, to his own taste. Now, it is an interesting point here that the institutional users do not want us to do their job for them. They want the oil coat on the French fries, but they don't want us to cook

(Testimony of Evan Gheen, Jr.)

them to the color that they want, nor do they want a cooked product, as that would not work out well in their own work. A retail user or a housewife usually follows the directions [7] that are contained on the label of the package. The cooking instructions are shown on the label and vary from a period of 10 to 25 minutes at approximately 400 degrees in the oven or, alternatively, in deep fat she could fry them for a period ranging from one and a half to two minutes to two and a half minutes at a temperature above or below 350 to 400 degrees.

Q. Now, the cooking for 15 to 20 minutes, how is that accomplished? In an oven? A. Yes.

Q. And is the purpose of that just to thaw them out and warm them up, or is there any actual cooking in the process?

A. Oh, a potato that was introduced into an oven is thawed out and starts to warm up so that it is warm to the touch at the end of two to three minutes, depending on the potato.

Q. What happens after that?

A. The rest of the time is used for the actual cooking process.

Q. This product, if you took a package out and simply thawed it out to get rid of the freezing, would it be a palatable product?

A. Well, yes and no. You could swallow it, but it is not healthy so to do.

Q. Why do the institutional users want the oil on the potato?

(Testimony of Evan Gheen, Jr.)

A. Because it decreases the amount of oil that [8] is absorbed by the potato in their own fryer, and we can buy oil cheaper than they can, and we can coat the potato cheaper than they can, and it decreases the amount of time that is required to reconstitute the product in their own shop.

Q. Is the oil coated French fry a more valuable product than a French cut?

A. Approximately two cents a pound. It varies sometimes up to three cents a pound.

Q. Now you also have something to do with freight rates, do you not?

A. That is correct. Not with the rates, but with the use of traffic.

Q. You are acquainted with the various tariffs that you use there in the plant?

A. In a general sort of way.

Q. Tell us what the history of the freight rates has been there as to the classification of the pre-trial order, the classification of Item 4715?

A. Well, as we got into the potato-processing business we originally commenced the shipping of our potato items under the same classification. After a period of time we were instructed that the potatoes which had been oil-blanching, or French-fried, according to the term that you like to use, were to be classed as a cooked vegetable, whereas all of the other potato items, together with all of the other items [9] which we processed, were to be classified in a different group which is called a fresh frozen product. At that time there was a

(Testimony of Evan Gheen, Jr.)

difference in cost or in the rate of shipping these two classifications, and we had customers——

Mr. Roos: Excuse me, your Honor. I would like to object for the record to any testimony with respect to a period outside of that within which the shipments in question moved.

The Court: You may continue, subject to the objection.

Mr. Gallagher: Go ahead.

A. At the time that the processed potato was making momentum, our customers violently objected to paying the difference in rate between a potato which had been oil-blanching or French fried and one which had not. It worked a hardship on the whole industry, so our first step was to request our local carrier to introduce something which would re-classify——

Q. Let me interrupt you there, Mr. Gheen. As I understand it, all your products out of your plant went out under this Item 4715. Then the question was raised as to the so-called French fries, and you were requested to ship them under Item 4600; is that correct? A. That is correct.

Q. And for a period of time they continued to be shipped under 4715, and then after that period [10] of time you shipped them under 4600?

A. That is correct.

Q. In water-blanching a potato for a minute and a half in water, does that completely kill the enzymes?

(Testimony of Evan Gheen, Jr.)

A. No, it takes a longer blanching than that, as I guess I introduced here a little while ago.

Q. Now, was the freight rate under both of these items, 4600 and 4715, originally the same in dollars?

A. I think that depends how far back you go. At the time we commenced shipping the volume was different.

Mr. Gallagher: I think you may cross examine.

Mr. Roos: Mr. Gallagher, was it your intention to introduce these labels?

Mr. Gallagher: Your Honor, we have reserved a place in the pre-trial order for exhibits, and Counsel and I have agreed, subject to the approval of the Court, that we might introduce a few labels.

Q. Mr. Gheen, you have been handed Exhibits 1, 2 and 3, Defendant's Exhibits for Identification. Can you tell us what they are.

A. They are labels owned by three of the customers for whom we pack.

Q. Do they relate to French fries?

A. Yes. We pack quite a few French fries under these labels for these customers. [11]

Q. And they are used in the plant for packing some of the particular French fries that are under consideration here?

A. That is correct.

Mr. Gallagher: We offer Defendant's Exhibits 1, 2 and 3.

Mr. Roos: No objection.

The Court: Admitted.

(The labels above referred to were thereupon

(Testimony of Evan Gheen, Jr.)

received in evidence as Defendant's Exhibits 1, 2 and 3, respectively.)

Q. (By Mr. Gallagher): Do those exhibits give the cooking instructions in some instances?

A. Yes, they do.

Q. And that is for the housewife or the institutional consumer? A. That is correct.

Q. Mr. Gheen, you have been handed what have been marked for identification as Defendant's Exhibits 4 and 5. Would you tell us what they are.

A. This appears to be portions of Tariff 2-U which governs the shipping of most of our products.

Q. Directing your particular attention to one of the exhibits which has the item 4600, and your [12] particular attention to the second page with the little arrow, is that the item under which the railroad requested you to ship these French fries under Item 4600?

A. Yes, in that sense. I am not sure whether you would call it the railroad or the Classification Committee, but we were instructed to use it by both.

Q. In any event, that is the tariff that we are speaking of, is it not, No. 4600?

A. That is correct.

Q. Referring to the other exhibit containing Item No. 4715, on the first page thereof is an arrow. Is that the item under which you have shipped all of the products of the plant which are frozen?

A. Yes, we have shipped all of them under this group at one time, and at another time it was divided between the two.

(Testimony of Evan Gheen, Jr.)

Mr. Gallagher: We offer Defendant's Exhibits 4 and 5.

Mr. Roos: No objection.

The Court: They are admitted.

(The excerpts from the tariffs above referred to were received in evidence and marked Defendant's Exhibits 4 and 5, respectively.)

Q. (By Mr. Gallagher): Mr. Gheen, can you give us a comparison in the cooking time of the various products of the plant, [13] the corn on the cob and kernel corn, and the mixed vegetables, and also carrots as compared to the cooking time of French fries?

A. Do you mean the blanching time?

Q. No, no. A. Cooking time?

Q. Cooking time by the housewife.

A. In a general sort of way it is very much the same thing. I think that can be best demonstrated by one of the exhibits over here on which I base a comparison of the cooking time for the different vegetable items that are frozen.

Q. Let's take mixed vegetables.

A. I think in a general sort of way that you could say that these items require from 8 to 22 minutes that are compared on this particular chart, and mixed vegetables 15 to 18 minutes.

Mr. Roos: Mr. Gheen, which exhibit are you referring to?

A. This is Exhibit No. 2.

Q. (By Mr. Gallagher): Let's compare the po-

(Testimony of Evan Gheen, Jr.)

tato patty. How long does it take to cook a potato patty?

A. Approximately the same time that it takes to cook a French fried potato, from 10 to 25 minutes, depending on the taste of the housewife and the accuracy of her oven, and so forth. [14]

Q. And kernel corn?

A. Very much the same. Let's see what it says on here. It says 6 to 8 minutes on kernel corn here.

Mr. Gallagher: I think you may cross examine.

Cross Examination

Q. (By Mr. Roos): Mr. Gheen, you have indicated that your position with the defendant is as Assistant Sales Manager?

A. That is my title, yes.

Q. And have you been employed in the plant proper or in the laboratories?

A. I am employed in the plant proper in the sense that there is only one plant. It is all one connected plant.

Q. You have given certain testimony with respect to blanching times and cooking times, and so forth. I will ask is that testimony given from your own personal observations or tests which you have made in the course of your duties, or is it more or less by information derived from other employees?

A. It is from both. I have at times examined blanchers and fryers for time and temperature. The particular figures which I introduced here were not my figures alone, but the figures as agreed upon

(Testimony of Evan Gheen, Jr.)

by several members so that I would not bias or otherwise misrepresent the actual facts. So in [15] the capacity that I exercise as quality control manager I called together our entire quality control group and asked them to verify these times and temperatures, and they so did before I came down here.

Q. With respect to this oil-blanching process, Mr. Gheen, is any flavor imparted to the potato as well as the heat?

A. The flavor of the oil, I guess, you would say would be imparted.

Q. Would you say it is that flavor which largely distinguishes French-fried potatoes from other types?

A. That is a very vague question. In the finished product the inside of the potato is—in the finished product as the ultimate user gets it the inside of the potato is very much like a baked potato and the outside has the flavor of oil, you might say, the crust.

Q. Now, have you ever merchandised potatoes cut in the shape of French fries without the oil-blanching process?

A. We have so done.

Q. You have so done. But I understand that your customers prefer the oil processing to be performed by your plant; is that correct?

A. Very much so.

Q. Does the French-fried potato have any greater or less qualities of preservation than the water-blanching vegetables?

(Testimony of Evan Gheen, Jr.)

A. It depends on the degree of water-blanching, for one thing, [16] and on the inherent qualities of the potato. In a general way, a potato which has been oil-blanching would stay out in the open air for a slightly longer time than one which had not been oil-blanching. That is part of the reason for the coating of oil, is that it helps the chef in the time element that is involved in his work.

Q. Speaking of vegetables other than the French-fried potato, do certain of these vegetables have greater density—or may I ask you this: Do all of these other vegetables have greater density than the French-fried potatoes?

A. There are variations in density, and there are variations even among potatoes. Every potato is an individual.

Q. Separately taking vegetables other than potatoes of any kind, in shipping them would you say carrots and peas have the greatest density of any of the vegetables?

A. I wouldn't say that I am technician enough to answer that question.

Q. Can you tell us whether these other vegetables move at greater or less minimums under the tariffs? Do you happen to know that?

A. They move under very similar minimums. The minimums, in a general way, that we have used have been 46,000 pounds per car or 60,000 pounds per car.

Q. Now, you indicated on direct examination that French-fried potatoes, as I heard it, are a more

(Testimony of Evan Gheen, Jr.)

valuable commodity [17] than the French-cut potatoes.

A. By two to three cents.

Q. By two to three cents. And the French cut, I understand, have not been subjected to the oil blanching?

A. That is correct.

Q. Taking the French-fried potatoes as such, in the hands of the consumer, as far as you know, it is used only as a French-fried potato; is that correct? In other words, in the course of preparation the resulting product for the one who is going to consume it is that it is identified only as a French-fried potato; it is not ordinarily adaptable for other types of cooking. For instance, would you use it in soups?

A. I don't think, by and large, that you would use it for anything else.

Q. That is right. Now, on the other hand, the other types of vegetables which have been subjected only to water-blanching might be used by the housewife for many different cooking purposes?

A. It depends on the shape of the product that is presented to them.

Q. For instance, let's take peas. Your frozen peas are used—I assume they can be boiled and served as such; is that right?

A. Correct. [18]

Q. And they can be served in salads?

A. You would cook them first, I think.

Q. You would cook them, yes, that is right. But they could be served in salads and they could be placed in stews and soups; isn't that right?

(Testimony of Evan Gheen, Jr.)

A. Yes.

Q. Does your company, Mr. Gheen, produce other frozen products such as frozen pies?

A. We manufacture no pies.

Q. You do not? A. No.

Q. You simply furnish the ingredients, the vegetables? A. That is correct.

Q. Are you familiar at all with the manner in which certain of these other frozen products, such as peas, are prepared by the consumer, or the duration of time which it takes to prepare them for the table?

A. Well, I am not too familiar with that, no.

Q. Now, on Exhibit 1, which is the label for the Bel-air French-fried potato, what process is used for the French-fried potato so packaged, and in which it is referred to on the label as cooked in pure vegetable oil? Is it the same process you have described for all of these?

A. It is the same process as I described for the oil blanching with the exception that we introduce a slight amount [19] of color to the product. In this particular case, measured by U.S.D.A. standards, the color would be gauged between 1 and 2 U.S.D.A. And in order to introduce this color there is an increase in the time of approximately 15 to 30 seconds.

Q. Now, is your product then produced more or less in accordance with the specifications of your customer? A. That is correct. They are.

Q. And I understand, then, that he specifies a

(Testimony of Evan Gheen, Jr.)

particular shade of color which you have indicated might be No. 1, No. 2 or—how far do these designations go?

A. He designates the color. A particular buyer of frozen food, they specify the color. Others do not.

Q. Will you tell us all of these specifications of color. You indicated some numbers. How many numbers are there?

A. There are a total of four numbered colors. However, there can be color above and below the four numbered ones. The colors are 1, 2, 3 and 4, in order light, medium, dark and very dark.

Q. This sort of specification is peculiar, is it not, to French-fried potatoes?

A. No, no. It is not peculiar. The same customer has defined each step in the process in other commodities as well as this one.

Q. Do you mean to say with respect to peas and carrots he will define the period of time—— [20]

A. The time and temperature that is required, yes.

Q. Now, on Exhibit No. 3, the cooking instructions, there are certain descriptive notes, as follows: "High quality potatoes have been carefully selected, peeled, washed and cut. After being fried in pure vegetable oil they are immediately quick-frozen." Now, by the use of the term "fried in pure vegetable oil" do you mean to describe the oil-blanching process which is used for all potatoes?

A. The term is applicable in the sense that the

(Testimony of Evan Gheen, Jr.)

industry and the consumer understand it in that way.

Q. What do you think the consumer understands by the word "fried"?

A. The word "French-fried" was in existence before the processed potato came along, and other processors were in business approximately for ten years before we came along in our little plant over in Ontario there, so some folks called this same product oil-blanché and some folks called it French-fried. As the housewife thinks of it, she understands in her own mind that this product has to be cooked before it is ready to eat. We understand it, also, so between us we have a common agreement about what the term means. To institutional users we oscillate in describing the product. We sometimes use the term "oil-blanché" and we sometimes use the term "French-fried," according to what the particular customer has become acquainted with. [21]

Q. Now, let me ask you this: Is this same type of label used both for the institutional customers as well as the housewife?

A. That is a retail label, used only——

Q. When you say that, are you referring to——

A. Any of those.

Q. Any of these three?

A. Any of those smaller labels are only for the housewife, sold through stores.

Q. The label for the institutional user has to carry different instructions?

(Testimony of Evan Gheen, Jr.)

A. It is not actually a label in the sense that you think of that being a label. The instructions are sometimes printed on the case, the shipping case in which the product goes forward.

Q. Incidentally, as far as these several shipments involved in this case are concerned, would it be correct to say that in practically every case, both institutional as well as the product for use by the housewife, they moved in the same shipments, or could that have been the case?

A. It could be, but there is no general rule governing that.

Q. No general rule?

A. It is just happenstance.

Q. You have indicated as far as the preparation by the [22] housewife is concerned that she could prepare this in one of two ways. One, I believe, was to dip them in deep fat; is that right?

A. Yes.

Q. Or she may bake them in the oven?

A. Yes.

Q. You testified that after three minutes, I believe the time was, the potatoes should begin to warm up. Now, did you mean to say by that statement that the potato was sufficiently heated in that time right through to the middle and ready to serve on the table?

A. No. Yesterday this very question came up. If I may, I will give you a background of it. In our own minds we were wondering how you folks would think of this, so we called the U.S.D.A. men in our

(Testimony of Evan Gheen, Jr.)

plant and asked them to take the product under question here and put it in the oven and see how many minutes it took to take the cold out of it, and then to eat it, and then to follow the instructions by submitting it to the rest of the heating time. And their answer to us was that it took between two and three minutes to take the cold out of the product so that the product was warm to the touch. The product still tasted raw in their mouth at that stage. And that it took the rest of the cooking time in order to get it cooked in readiness to eat.

Q. Of course, I understand the extent of the cooking time [23] is a matter of the taste of the housewife?

A. That is correct; very much so.

Q. Whether the potato would be firm or soft?

A. Yes.

Q. Now, Mr. Gheen, returning once again to these specifications, you have indicated the specification by color number. Now, can you give us an idea as to what times are involved there? In other words, what is the spread, the time spread?

A. The time spread is 30 seconds. We don't set about to produce anything higher than a No. 2 in color. Institutional users are predominantly zero to one, from colorless to a light color. All they want is the oil coating on there. The retail housewife—these buyers who interpret the housewife's desires say that they want something halfway between a 1 and 2 in color. To achieve a zero to one we pass it through for a period of one minute plus or minus.

(Testimony of Evan Gheen, Jr.)

To achieve a 1 to 2 color we pass it through for a period varying up to one and a half minutes.

Q. The 1 to 2 color, I assume, is the color one might ordinarily find on the potatoes as served on the table; isn't that right?

A. That is correct. It is described as a light golden color.

Mr. Roos: That is all, your Honor. [24]

Redirect Examination

Q. (By Mr. Gallagher): Just a couple of questions, Mr. Gheen. Regardless of the color, do all these French fries have to be cooked after they leave your plant?

A. Yes, they do. They require cooking.

Q. Does it take any different length of time to cook them by the housewife whether they are No. 1 color or No. 2 color?

A. No, for the reason that the color is not attributable chiefly to the oil but to the sugars that are inherent on the surface of the potato. Therefore, the housewife's cooking time is very much the same.

Q. The institutional users who want the zero to No. 1 color, as I understand, what they are after is the oil coating for the advantage that you have described?

A. That is correct.

Q. That is, less oil has to be used by the hotel or restaurant or operator?

A. That is correct. They say to us, "Let us put the color on. We know our business."

(Testimony of Evan Gheen, Jr.)

Q. They consume less of their own oil; in other words, you are selling grease and potatoes?

A. Yes.

Q. Now, on the question of labels, regardless of what you call it, whether it is described there as a French fry [25] or an oil blanch, is this the process that you go through regardless of——

A. The process is identical.

Q. You were asked about minimum rates. What is the significance of that, if any?

A. From my point of view, you mean?

Q. Yes, from your point of view.

A. I don't know what the particular significance might have been in their minds as they asked me the question. We are able to load the cars to the required capacities of 46,000 and 60,000 pounds on all the products that we pack. Therefore, it is not a limiting factor.

Q. Do you have some problem in connection with the minimum weights if you have these two classifications in one carload? In other words, if you have French fries——

A. No, the minimum weights are identical regardless of whether it is French fries or other frozen vegetables.

Q. Then do you have any other problem? If you have a half a carload of French fries and half a carload of mixed vegetables, does that create a problem?

A. The only problem that creates is that in the

(Testimony of Evan Gheen, Jr.)

difference in classification there results a difference in rate sometimes, depending on which period we are discussing. But that is a problem to us and a problem to the customer.

Q. Now, if this potato did not have an oil coating on it, [26] would the housewife be able to prepare it by putting it in the oven?

A. She could prepare it, but it wouldn't necessarily be something she would want.

Q. It would not be a desirable thing without this oil coating? A. Not in our opinion.

Q. You find that true in the trade?

A. Yes.

Q. That is why you put the oil coating on it?

A. Yes.

Q. You were asked about density. Do you know generally the density difference between a carrot and——

A. In a general sort of way the density of a potato is greater than the density of water.

Mr. Gallagher: I think that is all.

Mr. Roos: Nothing further.

(Witness excused.)

Mr. Gallagher: Your Honor, I may or may not have one other witness. If I had a couple of minutes to talk to him, then I know we will be through by noon.

The Court: Take five minutes.

(Short recess.) [27]

Mr. Gallagher: That completes our testimony in the case in chief, your Honor.

Mr. Roos: The plaintiff has no rebuttal. We rest.

The Court: I will hear you in argument now.

(The matter was argued to the Court by Counsel for the respective parties and was thereafter taken under advisement by the Court.) [28]

[Endorsed]: Filed May 15, 1957.

[Endorsed]: No. 15582. United States Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, Appellant, vs. Ore-Ida Potato Products, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 7, 1957.

Docketed: June 14, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15582

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff-Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant-Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Comes now appellant and files this, its statement of points on which appellant intends to rely on the appeal of this cause, to wit:

(1) The trial court erred in its Findings of Fact No. XII by concluding that "the potatoes herein do not lose their substantial identity in the process described in Par. XI above and are frozen fresh vegetables" and "are not a frozen cooked food".

(2) The trial court erred in its Conclusion of Law No. 1, which reads:

"That the process described in Paragraph XI above involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI above, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs

described in Paragraph V of the Agreed Facts as cooked foods.”

(3) The trial court erred in its Conclusion of Law No. II, which reads:

“That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.”

(4) The trial court erred in its Conclusion of Law No. III, which reads:

“That by reason of the above the defendant is entitled to recover from plaintiff as overcharges, including the Federal transportation tax on the shipments described in Paragraph IV of the above the sum of \$5,331.24.”

(5) The trial court erred in failing to conclude and hold that the potatoes, by reason of the process described in Paragraph XI of the Findings of Fact, lost their identity as raw potatoes or fresh vegetables, but are a frozen cooked food.

(6) The trial court erred in failing to conclude and hold that the process described in Paragraph XI of the Findings of Fact involves the preparation of potatoes for consumption by the action of heat and renders the product a “food cooked, cured or preserved” within the meaning of the tariffs described in Paragraphs V and VI of the Findings of Fact.

(7) The trial court erred in failing to conclude and hold that said potatoes are not properly classified as “vegetables, fresh or green” under Item

4715 of the tariff described in Paragraphs V and VII of the Findings of Fact.

(8) The trial court erred in failing to conclude and hold that by reason of the Findings of Fact I through XI inclusive the plaintiff is entitled to recover from the defendant as undercharges, including the Federal Transportation Tax, on the shipments described in Paragraph IV of the Findings of Fact the sum of Six Thousand Two Hundred Thirty-six Dollars and Eighty-six Cents (\$6,236.86) plus interest and costs.

(9) The trial court erred in failing to grant plaintiff-appellant's motion for summary judgment.

(10) If the Court finds that the language of Items 4600 and 4715 of the tariffs described in Paragraphs V and VII of the Findings of Fact was not used in its ordinary sense, and that extrinsic evidence is necessary to determine the meaning of such language in the light of trade usages and practices, then the District Court had no jurisdiction of the controversy in advance of a determination by the Interstate Commerce Commission of the effect of such language as so used.

Respectfully submitted this 14th day of June, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

Comes now appellant and designates the following portions of the record on appeal to be printed herein, which includes all of the record which either appellant or appellee deems material to the consideration of the appeal, to wit:

As Designated by Appellant by Designation of Record on Appeal Filed in the District Court:

1. Plaintiff's complaint (filed January 17, 1956).
2. Certificate of Service and Answer (filed April 9, 1956).
3. Reply to counter-claim (filed May 31, 1956).
4. Pre-trial order (filed February 13, 1957).
5. Motion for summary judgment (filed February 11, 1957).
6. Memorandum of decision (filed March 14, 1957).
7. Findings of fact and conclusions of law (filed March 18, 1957).
8. Judgment (entered March 18, 1957).
9. Notice of appeal (filed April 15, 1957).
10. Appellant's statement of points.
11. Supersedeas bond on appeal (filed April 15, 1957).
12. Appellant's designation of record on appeal.
13. Order for transmittal of exhibits.
- 13-A. Amended order for transmittal of exhibits.
14. Amendment to designation of record on appeal.

15. Appellant's supplemental statement of points.
16. Transcript of docket entries.
17. Clerk's certificate.

Exhibits four (4) and five (5).

As Designated by Appellee By Additional Designation of Record on Appeal Filed in the District Court:

12-A. Defendant's additional designation of record on appeal.

Transcript of the testimony and all proceedings had at the trial of this cause in the District Court.

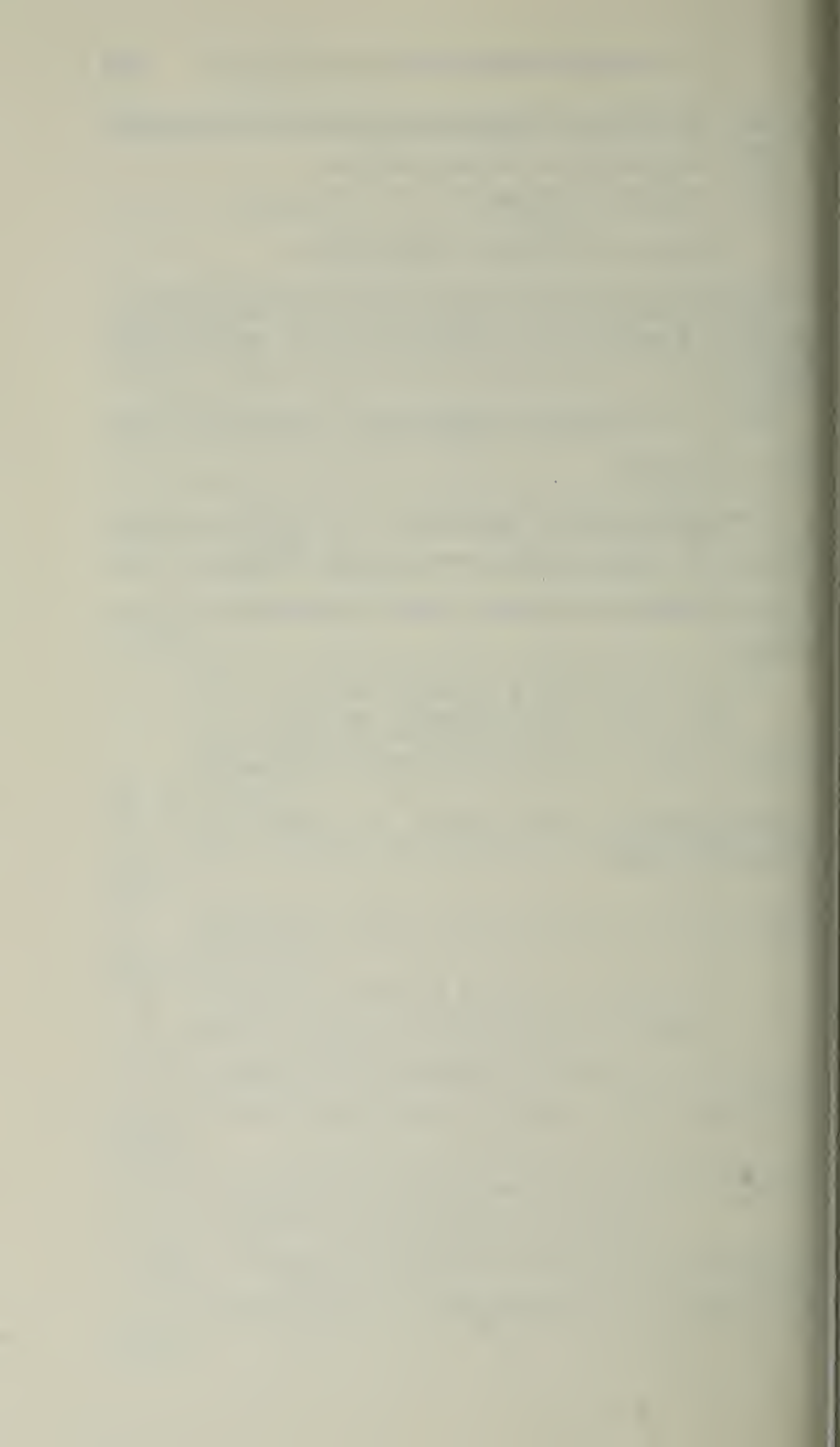
Respectfully submitted this 14th day of June, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1957. Paul P. O'Brien, Clerk.



No. 15582

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Brief for Appellant

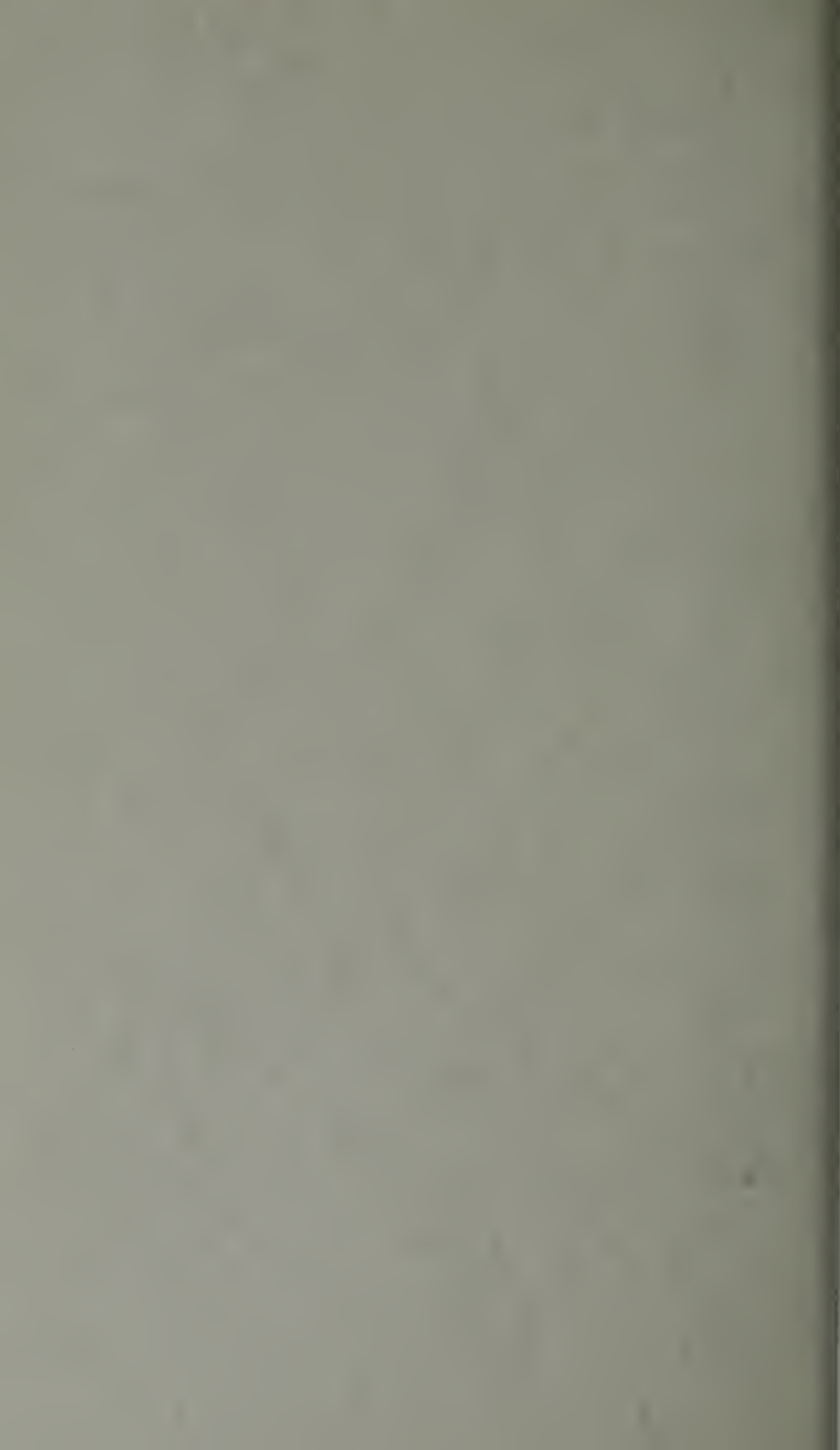
Appeal from the United States District Court
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FILED

AUG 30 1957

PAUL P. O'BRIEN, CLERK



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United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Brief for Appellant

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

This action was brought by the Union Pacific Railroad Company to recover from Ore-Ida Potato Products, Inc., undercharges on shipments of frozen French fried potatoes transported in interstate commerce by the rail lines of plaintiff and connecting carriers. The amount sought to be recovered, as stated in the Pre-Trial Order is \$6,236.86 (R. 14). The defendant counterclaimed for overcharges on similar shipments in the amount of \$5,331.24, as shown in the Pre-Trial Order (R. 15).

Upon the trial, the issues were submitted to the Court without a jury, the Court having reserved his ruling on plaintiff's motion for summary judgment. The Court, after hearing oral testimony on behalf of defendant, over plaintiff's objection, made Findings of Fact and Conclusions of Law and entered judgment on March 18, 1957 in favor of defendant (R. 22). Notice of Appeal was filed April 15, 1957 (R. 23).

Jurisdiction

Jurisdiction is predicated upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U.S.C.A., Title 49, Chapters 1 and 2), and acts amendatory thereof and supplemental thereto (R. 10-17). The jurisdiction of this Court to review the judgment is based upon 28 U.S.C., § 1291.

The Facts

The Agreed Facts in the Pre-Trial Order (R. 10-14) reveal that between January 6, 1954 and October 2, 1955, the defendant delivered to plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 shipments of frozen French fried potatoes, with directions that each of such shipments be transported by the rail lines of plaintiff and connecting carriers to destinations in the Eastern, Middle Western and Southern districts of the United

States. The shipments were accordingly transported and delivered to the consignees designated by defendant (R-11, 12).

The applicable freight tariff is a general commodity freight tariff, Item 4600 (Part 3) of which prescribed carload rates on "food cooked, cured, or preserved, frozen NOIBN in containers in boxes." (The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed By Name.") (R. 12; Def. Ex. 2). Item 4715 of said tariff prescribed carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables, either sweetened or not sweetened), in packages as prescribed in Western Classification (Subject to Notes 1 and 6)." (Said Notes 1 and 6 do not affect the issues in this case.) (R. 12; Def. Ex. 1) The Item 4600 rates were higher than the Item 4715 rates.

On certain of the shipments of French fried potatoes plaintiff collected the Item 4715 rates instead of the higher Item 4600 rates. This gave rise to plaintiff's undercharge claim of \$6,236.86 (R. 14). On certain of the shipments, plaintiff collected the Item 4600 rates. This gave rise to defendant's counterclaim for overcharges in the amount of \$5,331.24 (R. 15).

As stated in Paragraph XI of the Pre-trial Order (R. 13) the frozen French fried potatoes had undergone the following handling and processing after harvesting:

“The potatoes referred to above were hauled from farmers’ fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

“The oil blanching consisted of immersing the sliced potatoes in blanching oil at 350°F for one and one-half minutes. They were partially browned by the oil blanching. They were cooled and quick-frozen to a temperature of -15° to -20°F, packaged, labeled, and stored in zero storage. They were shipped in refrigerated cars of the plaintiff. The purpose of blanching was to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing was to prevent spoilage and to preserve potatoes in a fresh condition.”

The foregoing Agreed Facts were incorporated in substantially the same language, in the Findings of Fact entered upon the Trial Court’s decision (R. 17-21).

The Issues

The underlying issue of the case is very simply defined in the Pre-Trial Order as:

“Were the potatoes which constitute the shipments described in Paragraph IV of the Agreed Facts ‘food cooked’ as classified in Item 4600 of the tariffs described in Paragraph V of the Agreed Facts, or were said potatoes ‘vegetables, fresh’ as classified in Item 4715 of said tariffs.” (R. 15)

A secondary issue arises by reason of the Trial Court's admission in the record of oral evidence and exhibits extrinsic to both the Agreed Facts and the tariff. Throughout the trial, plaintiff took the position that there was presented only a question of law, and that no oral testimony was warranted (R. 31, 54). The Court, however, admitted in evidence the oral testimony of defendant's witness, and also defendant's Exhibits 1, 2 and 3, which consisted of sample labels in which the packaged French fried potatoes were wrapped (R. 30-54).

The Record on Appeal

Consistent with its legal position, appellant omitted from its designation of the record the transcript of testimony before the trial court, as well as defendant's Exhibits 1, 2 and 3. Such proceedings, however, were included in the record by virtue of appellee's additional designation of the record (R. 58, 59).

SPECIFICATIONS OF ERROR

The specifications of error to be discussed are set forth in the Statement of Points on Which Appellant Intends to Rely (R. 55-57). For purposes of argument, the following grouping is indicated in relation to the two issues discussed above:

I.

The Trial Court erred:

(a) In refusing to grant plaintiff's Motion for Summary Judgment (R. 57).

(b) In its Finding of Fact that the potatoes did not lose their substantial identity by the processing described and were frozen fresh vegetables, not a frozen cooked food; and in failing to conclude that the frozen French fried potatoes by reason of the processing described lost their identity as raw potatoes or fresh vegetables, but were a frozen cooked food (R. 55, 56).

(c) In its Conclusion of Law that the process described involved the preservation of potatoes by blanching and freezing; that the potatoes were not cooked; that they should not be properly classified under tariff Item 4600; and in failing to conclude that the process described involved the preparation of potatoes for consumption by the action of heat and rendered the product "a food cooked, cured or preserved" within the meaning of tariff Item 4600 (R. 55, 56).

(d) In its Conclusion of Law that the French fried potatoes were properly classified as frozen vegetables under tariff Item 4715; and in failing to conclude that the frozen French fried potatoes were not properly classified as "vegetables, fresh or green" within the meaning of tariff Item 4715 (R. 56).

II.

The Trial Court erred in admitting as evidence in the record the oral testimony of defendant's witness and defendant's Exhibits 1, 2 and 3 (R. 30-54).

SPECIFICATION OF ERROR I

Summary of Argument

1. If the words of a tariff are used in their ordinary sense, their construction presents solely a question of law.

2. The language of a tariff must be read fairly and reasonably in the light of every word, clause and sentence, each according to its ordinary meaning.

3. The commodities embraced by Item 4600 ("cooked" food) are those which are not in their raw and natural state, even though they may not have been completely processed for human consumption.

4. The commodities embraced by Item 4715 ("fresh or green" vegetables) are those which are readily identifiable as being in their raw and natural state, and adaptable to purposes common to the raw product.

5. The frozen French fried potatoes are a "food, cooked, cured or preserved, frozen" and are properly classified under Item 4600.

Argument

The essential facts having been agreed upon, the Court is concerned solely with the application of the plain, unambiguous language of the tariff to the commodity in question.

1. *A Legal Issue*

In *Great Northern Ry. Co. vs. Merchants Elevator Co.*, (1922) 259, U.S. 285, the United States Supreme Court said (p. 290):

“Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law.”

And likening a tariff to any other document, said (p. 291):

“But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

“When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law.”

It concluded (p. 294):

“Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts.”

In *Pennsylvania R. Co. vs. Fox & London*, (1938) 93 F.2d 669, the Court said (pp. 670, 671):

“And, moreover, where the terms of the published tariff are themselves unambiguous, the

issue must be resolved by reference to the rate published, treating it as established law like any plain statute, leaving only the incidental issue of applicability which is dependent only upon the fact of the nature of the commodity shipped. Properly speaking, no construction of a tariff is involved where the only controversy is whether the commodity shipped is one or another of two things plainly classified. That was the real issue here, and, because that is so, much of the argument as to tariff construction generally is beside the point."

In *United States vs. Missouri-Kansas-Texas R. Co.*, (1952) 194 F.2d 777, the Court observed (p. 778):

"The construction of a printed railroad tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute."

and having stated its interpretation, said at page 779:

"This is the clear, unambiguous meaning of the words used in the tariff and is alone the intention to which the law gives effect."

In *Reading Company vs. Penn Paper And Stock Co.*, (1955) 134 F. Supp. 239, the Court said (p. 242):

"There is no dispute as to the facts, no question as to the exercise of administrative discretion, but merely one of construction as to which rates applied to this particular shipment. Under such circumstances it has been held that this Court

can decide the issue. *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 6 Cir., 1936, 82 F.2d 94; *Louisville & N. R. Co. v. United States*, D.C.W.D. Ky. 1952, 106 F.Supp. 999; *American Ry. Express Co. v. Price Bros.*, 5 Cir., 1931, 54 F.2d 67."

Stated in another way, the Court in *Northwestern Auto Parts Co. vs. Chicago, B. & Q. R. Co.*, (1956) 139 F. Supp. 521, said (p. 523):

"The sole issue is as to the nature of the material shipped for rate purposes. This is the only issue the court is empowered to decide. See *Sonken-Galamba Corp. v. Union Pac. R. Co.*, 10 Cir., 1944, 145 F.2d 808."

See also *Black vs. Southern Pac. Co.*, (1918) 88 Or. 533.

2. Fair and Reasonable Construction

In *United States vs. M.K.T. Ry. Co.*, supra (194 F.2d 777), the Court said (pp. 778, 779):

"The four corners of the instrument must be visualized and all the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence therein contained. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers. But claimed ambiguities or doubts as to the meaning of a rate tariff must have a

substantial basis in the light of the ordinary meaning of the words used and not a mere arguable basis. *Hohenberg v. Louisville & N. R. R. Co.*, 5 Cir., 46 F.2d 952; *Christensen v. Northern Pac. Ry. Co.*, 8 Cir., 184 F.2d 534; *Norvell-Wilder Supply Co. v. Beaumont, Sour Lake & Western Railway Company*, 274 ICC 547."

In *Western Grain Co. vs. St. Louis-San Francisco Ry. Co.*, (1932) 56 F.2d 160, the Court said (p. 161): "Further, tariffs having as they do the effect of law, the language in them must be construed fairly and reasonably, in accordance with the meaning of the words used, and not distorted or extended by forced or strained construction."

Cited with approval in *Great Northern Ry. Co. vs. Armour & Co.*, (1939) 26 F. Supp. 964, 967.

See also *Carnegie Steel Company vs. Baltimore & Ohio Railroad Company*, (1928) 144 ICC 509, 510.

3. Item 4600 Controls

The description of the commodities embraced by the relevant portion in Part 3 of this item is "food, cooked, cured or preserved, frozen."

The word "cook" is defined in Webster's New International Dictionary, 2nd Edition, as:

"1. To prepare (food) by boiling, roasting, baking, broiling, etc.; to make suitable for eating, by the agency of fire or heat; hence, in technical processes, to prepare or treat by, or as by, similar action of heat."

In *The Caterina Gerolimich* (1930), 43 F.2d 248, 251, the Court noted the connotation of "cooked" in relation to onions which had spoiled in the hold of a ship, as "meaning heated to the cooking point by exterior forces."

Reference to other words or phrases in a tariff is appropriate in determining the meaning of the word in question. (*Carpenter vs. Texas & New Orleans R. Co.*, 89 F.2d 274; *Harrison Eng. & Const. Corp. vs. Alchison, T & S. F. Ry. Co.*, 78 F. Supp. 906; *Black vs. Southern Pac. Co.*, supra (88 Or. 533).)

We accordingly turn to the word "cure" and find it defined in Webster's New International Dictionary, 2nd Edition, as:

"3. To prepare for keeping or use; to preserve as by drying, salting, etc.; as, to cure fish; to cure hay, tobacco."

As used in the meat packing industry, the term "curing" has been defined in *Commonwealth vs. Clark*, 25 At.2d 143, as the treating of meat with "salt, smoke, etc." and the Court held that merely placing it under refrigeration does not change its character as "fresh" meat.

The term "preserve" in the context here used is defined in Webster's New International Dictionary, 2nd Edition, as:

"2.a. To save from decomposition, as by refrigeration, curing, or treating with a preservative;

as to preserve specimens or skins to be stuffed; to preserve milk indefinitely.”

Judicial definitions of the words in this tariff are meager, probably because they are words of common usage and their meaning well known. However, if we consider the term “cooked” in conjunction with the terms “cured” and “preserved”, we find the implication of a permanent change in character of the food from its raw state. The food has been in preparation for human consumption, but such preparation need not be completed. The preparation, however, must have progressed beyond the stage where the food is still identifiable as being in its raw and natural state. The process admittedly must have gone beyond water blanching and freezing, which do not change the appearance or limit the variety of uses of the raw product.

Following the rule of construction stated in *United States vs. M.K.T. Ry. Co.*, supra (194 F.2d 777) that “the four corners of the instrument must be visualized,” we turn to other provisions of Item 4600 which are shown on defendant’s Exhibit 1. Part 2 includes commodities described as follows:

“Pies, fish, meat or poultry, cooked, cured or preserved, with vegetable ingredients and seasoning, *with unbaked pie crust*, frozen solid, in inner containers in boxes.”*

*All emphasis in quoted matter in this brief are ours unless otherwise indicated.

and:

“Vegetables, with or without meat ingredients, cooked, frozen solid in inner containers in boxes.”

The commodities included in this Part move at higher minimum weights than those in Part 3. Other commodities included in Part 3 are:

“Pies, fish, meat or poultry, cooked, cured or preserved, with vegetable ingredients and seasoning, *with unbaked pie crust*, frozen solid, in inner containers in boxes.”

The significant feature of these references is the character of the commodities as cooked foods; but, as indicated in italics, they need not be completely cooked, ready for consumption.

4. Item 4715 Not Applicable

The description of the commodities embraced by the relevant portion of this item is

“Vegetables, fresh or green, cold pack (frozen fresh or green vegetables, either sweetened or not sweetened) in packages.”

The term “fresh” is defined in Webster’s New International Dictionary, 2nd Edition, as:

“1. Newly produced, gathered, or made; hence, not stored or preserved, as by pickling in salt or vinegar, refrigeration, etc.; as, *fresh* vegetables, fruit, etc.; *fresh* tea, raisins, etc.

“7. Having its original qualities unimpaired.”

The term "green" is defined in Webster's New International Dictionary, 2nd Edition, as:

"6. Grown above the ground; more narrowly, leafy;—applied to certain vegetables, as peas and spinach, to distinguish them from roots, as beets and carrots."

In *J. Hamburger Co. vs. Atlantic Coast Line R. Co.*, 229 ICC 795, the Interstate Commerce Commission said at page 796:

"The word 'green' used in conjunction with vegetables generally means fresh in the sense of newly gathered."

The few definitions available convey the commonly understood meanings of the terms "fresh" and "green" as applied to potatoes. The fresh or green potatoes must be in a raw state having the appearance of raw potatoes and usable for the variety of purposes to which a raw potato may be devoted. The extension of the tariff classifications to permit water blanching and freezing is merely a qualification which cannot lawfully be expanded in defiance of rate-making rules.

5. The Commodity—Frozen French Fried Potatoes

The common, ordinary meaning of the words "French fried potatoes" is set forth in Webster's New International Dictionary, 2nd Edition, as follows:

"Potatoes cut into strips and *cooked* by frying deep fat."

The characteristics of the product are its size and shape, and the French frying process to which it has been subjected. The process as described shows that in addition to the water blanching process, the potatoes have been immersed in oil and partially browned. After freezing, they are packaged and labeled as such.

Standards for commercially sold agricultural commodities are controlled by the Federal Food, Drug, and Cosmetic Act, and regulations prescribed by the Department of Agriculture, and tariffs prescribing rates on such commodities are intended to be consistent in terminology and classifications, with such requirements. Section 52.2391 of Title 7, Code of Federal Regulations, describes frozen French fried potatoes as prepared and sold by defendant:

“Frozen french fried potatoes are prepared from mature, sound, white or Irish, potatoes (*Solanum tuberosum*). The potatoes are cleaned, peeled, sorted, trimmed, washed, cut into strips, and are deep fried in a suitable fat or oil. They are frozen in accordance with good commercial practice and stored at temperatures necessary for the preservation of the product.”

Section 52.2396 describes color standards as follows:

“Frozen french fried potatoes that possess a good color may be given a score of 25 to 30 points. ‘Good color’ means that the units possess a characteristic light cream to golden color typi-

cal of properly prepared frozen french fried potatoes; that the product is bright, practically uniform in color and, after heating, is practically free from units which vary markedly from the predominating color."

As a contrast to the above processing, we call attention to Section 52. 2421 describing "peeled potatoes" (which may be cut into various shapes and sizes):

" 'Peeled potatoes' are clean, sound, fresh tubers of the potato plant prepared by washing, peeling, trimming, sorting, and by proper treatment to prevent discoloration, by the use of sulfur dioxide (SO_2) or other means which may be permissible under the provisions of the Federal Food, Drug, and Cosmetic Act. The product is properly packed in suitable containers and securely closed to maintain the product in a sanitary condition."

These contrasting descriptions emphasize the basic distinction between the French fried potato and the fresh or green potato.

By being subjected to the processing described in the Pre-Trial Order (R. 13), we submit that the French fried potato has undergone the very same process which, if resumed for a short time ($1\frac{1}{2}$ to $2\frac{1}{2}$ minutes) (R. 36), would complete preparation for the table. The state of preservation of the potato exceeds that afforded by the water blanching

process to which it has already been subjected (R. 44). Identity with its raw state has been lost by its cooking, distinctive shape and brown coloring. However, of particular significance is the fact that the housewife or commercial user can no longer use it for anything but a French fried potato; nor can it be served creamed, or used in salad. In short, its general utility as a raw potato has been destroyed. These facts are matters of common knowledge of which the Court will take judicial notice.

Sec. 203 (b) (6) of the Interstate Commerce Act (49 USCA 303 (b) (6)) exempts from the application of Part II of the Act:

“motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or *agricultural (including horticultural) commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property or passengers, for compensation.” (Emphasis ours)

The relevance of decisions under this Act (as to whether commodities are in their natural state or “manufactured”) to the issues before this Court lies in mutuality of purpose. In *East Texas Lines vs. Frozen Foods Express*, (April, 1956), 351 U.S. 49, the Court reviewed the legislative history of the exemption provision and concluded that the exemption “was designed to preserve for the farmers

the advantage of low-cost motor transportation" (p. 51). The purpose of the tariff classification now before this Court was to provide lower freight rates on agricultural commodities in their natural state than on those subjected to a higher degree of processing.

In *Home Transfer & Storage Co. vs. U.S.*, 141 F. Supp. 599, aff'd (November 1956) 352 U.S. 844, the United States District Court for the Western District of Washington, Northern Division, was called upon to determine the following question arising under the exemption provision (p. 600):

"Are frozen fruits and frozen vegetables agricultural commodities or manufactured products thereof?"

The processing applied to the frozen fruits and vegetables was reviewed by the Court (p. 600):

"Generally speaking, the quick freeze processing here contended by defendants to create non-exempt 'manufactured products' is as follows: To all fruits are added sugars and sirups, and to only peaches ascorbic acid also is added. Vegetables are washed, then blanched by heating them to temperatures high enough to kill the enzymes and then reduced to near zero temperature and uniformly kept that way. Stalky vegetables are sometimes split and less frequently a core is removed to facilitate blanching. Rhubarb is the only vegetable not so blanched, but to it sugar is added. The require-

ment of uniform maintenance of near zero temperature after the quick freeze processing applies to all fruits and vegetables.”

The Court applied the test adopted by the United States Supreme Court in *East Texas Lines vs. Frozen Foods Express*, supra, (351 U.S. 49), quoting from p. 54 of that report:

“ ‘At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been “manufactured” within the meaning of § 203(b) (6).’ ”

and held that the processing above described did not render the fruits and vegetables “manufactured products.”

An important sequel to this decision occurred in *W. W. Hughes-Extension-Frozen Foods*, MC 105782 Sub (3), where applicant sought a certificate of public convenience and necessity to transport by motor vehicle “fresh, cold-packed and frozen agricultural commodities, fish, sea food, and other frozen foods” between various points in the United States. In its very recent decision dated April 16, 1957, the Commission, by Division 1, adopted the Examiner’s report, which concluded that certain of the commodities sought to be transported were exempt under § 203(b) (6) of the Interstate Commerce Act, citing *Home Transfer & Storage Co.*

vs. U.S., *supra*, as authority therefor. These commodities are described in Footnote 2 to the decision as follows:

“Fruits and vegetables which are washed, placed in cans, have preservative added, and are transported in partially frozen, unfrozen, or completely frozen condition.”

The Commission held, however, that certain of the commodities sought to be transported were *manufactured products* and not exempt. These commodities were described in Footnote 3 as follows:

“Frozen strawberry and other purees; *frozen french fried potatoes*; frozen candied sweet potatoes; frozen eggs; frozen egg yolks; frozen meats; and frozen deviled crabs, deviled clams, fried scallops, ready-to-fry and fried oysters, fried fish fillets, fish sticks, codfish cakes, seafood dinners, deviled lobsters, and salmon croquettes.”

During the course of the trial it was suggested that decisions relating to the agricultural exemption under the Fair Labor Standards Act might, by analogy, have some relevance to the issues before the Court. That Act (29 U.S.C.A. §§ 201-219) prescribes minimum standards for certain classes of labor. Among the employees exempt from the Act are those engaged in “preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market” (§ 213(a)(10)).

The purpose of the exemption concerned the distinctive character of agricultural labor and farm conditions, (*Abram vs. San Joaquin Cotton Oil Co.*, (1942), 46 F. Supp. 969, 973). The labor factors which influenced this legislation are not involved in the classification of commodities for rate-making purposes or in providing economical transportation to the farmer. Regulations under the Act as contained in Title 29 CFR, §780.51, extend the first processing of vegetables "throughout each series of operations, including byproduct operations," commencing with the initial processing if performed at the same place. For example, the preparation of apples in their "raw or natural state" extends from peeling and coring to the production of pomace. The preparation of citrus fruit in its "raw or natural state" begins with the fresh fruit and includes the production of molasses from citrus waste. An examination of decisions under the Act accordingly reveals rulings which extend the stages of primary processing beyond the limits of interpretation applicable to the tariff language in this case.

SPECIFICATION OF ERROR II

Summary of Argument

1. The terms of the tariff items are clear and unambiguous and require no extrinsic evidence to aid their construction.

2. Expert testimony is not admissible to explain the terms of a tariff which are clear and unambiguous.

3. Under the rules of primary jurisdiction, when the terms of an interstate tariff are not clear and unambiguous, the Court has no jurisdiction to construe such tariff prior to a determination as to its meaning by the Interstate Commerce Commission.

4. An action based upon ambiguous terms of an interstate tariff should be stayed pending a determination by the Interstate Commerce Commission of the meaning of such terms.

Argument

Defendant, over plaintiff's objection, was permitted to introduce the testimony of defendant's witness Evan Gheen, Jr. (R. 31-53). The Court also received in evidence defendant's Exhibits 1, 2 and 3, which consisted of samples of labels in which the French fried potatoes prepared by defendant were shipped and marketed.

The Agreed Facts contained in the Pre-Trial Order are, we submit, all that was necessary to enable the Trial Court to determine the legal issues involved in the case. These facts embrace matters relating to the jurisdiction of the Court; the status of the parties; the shipments involved; the tariff items in question; a computation of the charges claimed to be due by each of the parties; the amount of the charges

actually paid; and a complete description of the process to which the potatoes were subjected. If Mr. Gheen's testimony is to be deemed relevant and accorded any weight, it must be considered necessary to enable the Court to construe the language of the tariff. The Trial Court must have determined that the language of the tariff was used in a peculiar or technical sense requiring specialized knowledge as to usages and practices in the trade, or of many intricate facts of transportation.

Expert Testimony

In the argument under Specification of Error I, we discussed a number of decisions which held that where the words of a tariff are clear and unambiguous, a question of law only is presented. In its strict sense the tariff is not subject to "construction." (*Penn. R. Co. vs. Fox & London*, supra (93 F.2d 669, 670)).

In *Black vs. Southern Pac. Co.*, supra (88 Or. 533; 171 P. 878), the Court was concerned with the question whether certain shipments were subject to a rate providing for refrigeration or a lower rate without such provision. The Trial Court allowed witnesses to testify as to the necessity for use of refrigerator cars. The Supreme Court, in reversing the Lower Court, said at page 537:

"It is the exclusive province of the court to construe the tariff provisions involved in this

controversy, and it was therefore error to permit rate experts to construe them:"

Doctrine of Primary Jurisdiction

If the Court were to find that the language of the tariff items in question is not plain and unambiguous, but that extrinsic evidence may be necessary to determine the peculiar meaning of the language, or to establish custom and usage, then an issue of fact arises. In *Great Northern Railway Company vs. Merchants Elevator Company*, supra, (259 U.S. 285) the Court considered such a contingency in the construction of a tariff, stating at pages 291 and 292:

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the de-

cision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.”

This principle was reiterated in the very recent decision of the United States Supreme Court in *United States vs. Western Pacific Railroad Company*, (December, 1956), 77 Supreme Court Reporter 161. The Court grounded its decision upon the two earlier cases of *Texas & Pacific R. Co. vs. American Tie & Timber Co.*, 234 U.S. 138, and *Great Northern R. Co. vs. Merchants Elevator Co.*, *supra*,

(259 U.S. 285) and said (p. 165):

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576.”

The following are specific instances in which the doctrine was applied:

Whether a steel bomb case filled with napam jelly without burster charges and fuses constituted “incendiary bombs” or “gasoline in steel drums” (*U.S. vs. Western Pacific R. Co.*, *supra*); whether shipments of oak railway crossties were subject to the tariff of lumber (*T.&P. Ry. Co. vs. American Tie & Timber Co.*, *supra*); whether shipments of electric refrigerators were classified as “cooling boxes or refrigerators and cooling or freezing apparatus

combined" under the 4th-class rate, or "cooling or freezing machines, cooling boxes or refrigerators" under the 5th-class rate (*Norge Corp. vs. Long Island R. Co.*, (1935) 77 F.2d 312); see also footnote on page 295 of 259 U.S. for additional citations.

The following are specific instances in which the doctrine was not applied:

Whether shipments of airplane, tank, and boat internal combustion engines were subject to an exception of "engines, internal combustion" under the heading "automobile parts," or "engines, steam or internal combustion, N.O.I.B.N." and "other articles" (*U.S. vs. M.K.T. R. Co.*, *supra*); whether shipments of paper were properly classified as "waste paper" or "spitting cups" (*Reading Co. vs. Penn Paper & Stock Co.*, *supra*); whether shipments of pickled fish were subject to rates on "fish, salted and pickled, (including caviar), under refrigeration," or to rates on "fish, salted and pickled, (including caviar)," (*Black vs. S.P. Co.*, *supra*); whether shipments of corn were subject to an exception applicable to "Grain, seed (field), seed (grass), hay or straw" (*Great Northern Ry. Co. vs. Merchants Elevator Co.*, *supra*); which of two minimum charge regulations was applicable to shipments of fresh meat (*Great Northern Ry. Co. vs. Armour & Co.*, *supra*); whether shipments of obsolete vehicle parts were subject to the rate on "auto parts and engine parts other than auto bodies having value for re-

conditioning," or the rate on "scrap iron or steel having value for remelting purposes only" (*Northwestern Auto Parts vs. Chicago B. & Q. R. Co.*, supra); see also footnote on page 295 of 259 U.S. for additional citations.

Referral to the Interstate Commerce Commission

In *United States vs. Western Pacific R. Co.*, supra (77 S.C. Rep. 161), the United States Supreme Court remanded the proceedings to the court of claims so as to permit reference to the Interstate Commerce Commission, holding that a two-year statute of limitation did not bar such reference of questions raised by way of defense.

In *Norge Corp. vs. Long Island R. Co.*, supra (77 F.2d 312), the Court observed (p. 315):

"The court might have followed the practice suggested in *Southern Ry. Co. v. Tift*, 206 U.S. 428, 27 S. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846, and *Mitchell Coal & Coke Co. v. Penn. R. R. Co.*, 230 U.S. 247, 248, 33 S. Ct. 916, 57 L. Ed. 1472, and have held in abeyance its decision on the motion for summary judgment until the appellee procured a determination by the Interstate Commerce Commission of the meaning of the classification items."

In *Southern Ry. Co. vs. Tift*, cited in the last quotation, the court dissolved a temporary injunction permitting complainants to make application to the Interstate Commerce Commission, with the privilege

thereafter of renewing their application to the Court. In *Mitchell Coal Co. vs. Penn RR. Co.*, also cited, the Court stayed dismissal of the complaint so as to allow plaintiff to present its claim to the commission as to the reasonableness of the practice in question, with the right thereafter to proceed with the trial in the District Court.

In *U.S. vs. Garner*, (1955) 134 F.Supp. 16, the Court ordered the action held in abeyance until plaintiff had an opportunity to apply to the Interstate Commerce Commission for a ruling as to the reasonableness of the rates involved. The Court cited as authority for its action *U.S. vs. K. C. Southern Ry.*, 217 F.2d 763, and *Bell Potato Chip Co. vs. Aberdeen Truck Line*, 43 MCC 337.

TESTIMONY OF EVAN GHEEN, JR.

and

EXHIBITS 1, 2 AND 3

Should the Court find it proper to consider the testimony of Mr. Gheen (and Exhibits 1, 2 and 3), we call attention to the following to show that such evidence is not actually adverse to appellant's position. (The principal references are supplemented in Appendix A to this Brief.)

The French fried potato undergoes a water blanching process prior to its oil treatment (R. 34). While one purpose of the water blanching and oil treatment is to inactivate the enzymes, there are

still other reasons why the customer demands the oil process:

(a) Both the institutional user and the housewife demand the oil coating (R. 35, 53).

(b) The defendant is able to perform the oil frying more cheaply than the customer (R. 35).

(c) The oil coating prevents the individual pieces from sticking together (R. 35).

(d) The oil coating reduces absorption of oil during final preparation by the customer (R. 36, 37).

(e) The oil frying imparts a special flavor to the potato (R. 43).

(f) The French fried potato has a higher quality of preservation than the water blanched potato (R. 43, 44).

(g) The color of the product sold at retail is the same as that served at the table (R. 50).

(h) The product sold to the institutional user is a custom product, complying with individual specifications (R. 46, 47).

(i) The unthawed French fried potato requires frying in deep fat for only $1\frac{1}{2}$ " to $2\frac{1}{2}$ " in preparing for table use (R. 36). This demonstrates the effectiveness of the oil frying process which supplants additional minutes of water blanching applied to the raw product not undergoing French frying. It is obvious that if the original process of oil "blanching" were continued for only a fraction

of a minute, the product would be ready for the table.

Certain other features serve to distinguish the French fried product from the raw potato:

(1) The French fried potato is a more valuable product than the processed raw potato, and sells for as much as 2¢ to 3¢ a pound more (R. 37).

(2) While the raw processed potato may be used for a variety of purposes, the French fried potato may be used only as such (R. 45, 46).

The samples of labels (Exhibits 1, 2 and 3) used in packaging the product destined to the housewife are illustrative of the distinctive and specially processed character of the French fried potato. They are described as "Golden French Fried Potatoes," and depicted in their golden brown color. They are represented as having been "cooked in pure vegetable oil" (R. 46); and it is stated that "after being fried in pure vegetable oil, they are immediately quick-frozen to seal in all the goodness and food values." In marketing and shipping this product as "French fried potatoes," the producer makes these definite representations to the public at large, including the appellant.

It is to be remembered that appellee is not a producer of agricultural products. Its sole operation is that of a food processing and quick freezing plant. It sells the finished product in the normal channels

of trade ready for use. The greater part of its processing operations are designed to give the product distinctive characteristics to facilitate their sale as a superior brand under particular labels. All this is quite apparent from Mr. Gheen's testimony, taken as a whole.

But appellee's witness also testified on another and different subject. He testified concerning the history of the freight rates applied to the two classifications in question (R. 37, 38); transportation characteristics such as difference in cost of shipping (R. 37, 38); customer attitudes with respect to freight rates (R. 38); and differences in values of products shipped under the two classifications (R. 37). All such matters involve factors of rate making and classification which, if necessary for consideration in order to determine the applicable rate, are within the exclusive primary jurisdiction of the Interstate Commerce Commission in the exercise of its expert and specialized functions.

CONCLUSION

Cursory discussion of the two tariff items in question may develop apparent ambiguities and over-lapping; but presumably there must have been some valid reason for the separate classifications and the different rate levels. We submit that this purpose becomes quite obvious when we consider some of the relevant factors from the rate-making point of view.

Item 4715, which prescribes the lower rates, applies to "fresh or green" vegetables—a term not at all confusing to any housewife who does the family shopping. Broadly speaking, it refers to vegetables in the original form in which they were produced by the grower, although cleansed and treated to preserve them in that form. They are products of the soil in which the grower still has an immediate interest. Transportation rates may, in some cases at least, directly affect the grower's return on his crop.

Item 4600, on the other hand, relates to food which has been processed (usually at a plant such as ap-pellee's) and more closely resembles a manufactured product. What had originally been known as a "fresh vegetable" has been transformed into what is commonly called a "food," having been cooked, cured or preserved and thereby committed to a particular use. Transportation rates on such commodities affect the grower only indirectly, if at all.

More than 30 years ago Congress became interested in the effect of freight rates on the welfare of farmers. By the Hock-Smith Resolution, passed in 1925, Congress directed the Interstate Commerce Commission to investigate all freight rates on farm products and reduce them to "the lowest possible lawful rates compatible with the maintenance of adequate transportation service" (43 Stat. 801-802).

and the Commission proceeded to do so. (164 ICC 319; 205 ICC 301). Some ten years later Congress passed the Motor Carrier Act but exempted from its provisions "motor vehicles used exclusively in carrying * * * agricultural commodities (not including manufactured products thereof)" (49 Stat. 545). While this exemption did not extend to railroads, it did have the effect of subjecting railroads to competition with unregulated truck transportation of agricultural commodities "not including manufactured products thereof." As anticipated by Congress, railroad rates on such exempt commodities had to be readjusted to meet that competition.

So, whether wisely or otherwise, Congress has established a policy which has had the effect of giving producers of agricultural products a certain degree of preferential treatment in the matter of freight rates. Appellee, though not such a producer, now seeks to take advantage of the lower rates designed to benefit only the growers of fresh vegetables. But appellee was expressly excluded from such benefits under the Motor Carrier Act when it ships the "manufactured products"; and we submit that it is likewise excluded from the benefits of the

lower rail tariff rates established to meet truck competition in the transportation of those same exempt agricultural commodities.

Respectfully submitted,

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APPENDIX A

Demand for Oil Processing

“Q. Is there any other purpose in oil-blanching?

A. The only other purpose would be to coat the product with oil.

Q. Why is that desirable?

A. Because the customer wants us to coat it with oil, as we can do it cheaper than he can.

Q. Is there any advantage relative to shipping?

A. There is an advantage both in the freezing and in shipping. If you don't coat it in oil, the product sometimes sticks together so that the shipper would have difficulty in separating the individual pieces. At the same time, it can be done. I wouldn't say that there is an advantage in shipping, no.” (P. 35)

★ ★ ★

“Q. Now, if this potato did not have an oil coating on it, would the housewife be able to prepare it by putting it in the oven?

A. She could prepare it, but it wouldn't necessarily be something she would want.

Q. It would not be a desirable thing without this oil coating?

A. Not in our opinion.

Q. You find that true in the trade?

A. Yes.

Q. That is why you put the oil coating on it?

A. Yes." (R. 53)

★ ★ ★

"Q. Why do the institutional users want the oil on the potato?

A. Because it decreases the amount of oil that is absorbed by the potato in their own fryer, and we can buy oil cheaper than they can, and we can coat the potato cheaper than they can, and it decreases the amount of time that is required to reconstitute the product in their own shop." (R. 36, 37)

★ ★ ★

"Q. With respect to this oil-blanching process, Mr. Gheen, is any flavor imparted to the potato as well as the heat?

A. The flavor of the oil, I guess, you would say would be imparted.

Q. Would you say it is that flavor which largely distinguishes French-fried potatoes from other types?

A. That is a very vague question. In the finished product the inside of the potato is—in the finished

product as the ultimate user gets it the inside of the potato is very much like a baked potato and the outside has the flavor of oil, you might say, the crust.” (R. 43)

★ ★ ★

“Q. Does the French-fried potato have any greater or less qualities of preservation than the water-blanching vegetables?

A. It depends on the degree of water-blanching, for one thing, and on the inherent qualities of the potato. In a general way, a potato which has been oil-blanching would stay out in the open air for a slightly longer time than one which had not been oil-blanching. That is part of the reason for the coating of oil, is that it helps the chef in the time element that is involved in his work.” (R. 43, 44)

★ ★ ★

“Q. Now, Mr. Gheen, returning once again to these specifications, you have indicated the specifications by color number. Now, can you give us an idea as to what times are involved there? In other words, what is the spread, the time spread?

A. The time spread is 30 seconds. We don't set about to produce anything higher than a No. 2 in color. Institutional users are predominantly zero to one, from colorless to a light color. All they want is the oil coating on there. The retail housewife—

these buyers who interpret the housewife's desires say that they want something halfway between a 1 and 2 in color. To achieve a zero to one we pass it through for a period of one minute plus or minus. To achieve a 1 to 2 color we pass it through for a period varying up to one and a half minutes.

Q. The 1 to 2 color, I assume, is the color one might ordinarily find on the potatoes as served on the table; isn't that right?

A. That is correct. It is described as a light golden color." (R. 50)

* * *

"Q. Now, is your product then produced more or less in accordance with the specifications of your customer?

A. That is correct. They are.

Q. And I understand, then, that he specifies a particular shade of color which you have indicated might be No. 1, No. 2 or—how far do these designations go?

A. He designates the color. A particular buyer of frozen food, they specify the color. Others do not.

Q. Will you tell us all of these specifications of color. You indicated some numbers. How many numbers are there?

A. There are a total of four numbered colors. However, there can be color above and below the four numbered ones. The colors are 1, 2, 3 and 4, in order light, medium, dark and very dark." (R. 46, 47)

Distinguishing Features of French Fried Potato

"Q. Is the oil coated French fry a more valuable product than a French cut?

A. Approximately two cents a pound. It varies sometimes up to three cents a pound." (R. 37)

* * *

"Q. Taking the French-fried potatoes as such, in the hands of the consumer, as far as you know, it is used only as a French-fried potato; is that correct? In other words, in the course of preparation the resulting product for the one who is going to consume it is that it is identified only as a French-fried potato; it is not ordinarily adaptable for other types of cooking. For instance, would you use it in soups?

A. I don't think, by and large, that you would use it for anything else.

Q. That is right. Now, on the other hand, the other types of vegetables which have been subjected only to water-blanching might be used by the housewife for many different cooking purposes?

A. It depends on the shape of the product that is presented to them.

Q. For instance, let's take peas. Your frozen peas are used—I assume they can be boiled and served as such; is that right?

A. Correct.

Q. And they can be served in salads?

A. You would cook them first, I think.

Q. You would cook them, yes, that is right. But they could be served in salads and they could be placed in stews and soups; isn't that right?

A. Yes." (R. 45, 46)

★ ★ ★

No. 15582

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,
Appellee.

*Appeal from the United States District Court for the
District of Oregon*

PETITION FOR REHEARING

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FILED

MAR 24 1958

PAUL P. O'BRIEN, CLERK

IN THE UNITED STATES COURT OF
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UNION PACIFIC RAILROAD COMPANY,
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Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,
Appellee.

*Appeal from the United States District Court for the
District of Oregon*

PETITION FOR REHEARING

The Appellee respectfully petitions the Court for a rehearing of this cause and submits that the Court erred in the following particulars:

I

In re-examining the question of fact as to whether or not the product was a cooked vegetable.

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II

In failing to accord the proper weight to the Findings of Fact on a contested issue.

III

In finding as a matter of fact the product was a cooked food.

IV

In finding that the french fried potatoes fit the description set out in Item 4600.

V

In finding that food is that partially cooked is "cooked food" within the meaning of Item 4600.

VI

In failing to give to Appellee the benefit of the rule that if the shipment could be included in more than one tariff designation it would be proper to select the item more specifically applicable to the product being transported.

VII

In failing to give to Appellee the benefit of the rule if there were two tariff descriptions equally appropriate the shipper would be entitled to the lower rate.

Our basic position is that the lower court necessarily had to make a finding of fact. There is only one fact that needs to be found and that is whether french fried

potatoes are a frozen fresh vegetable or whether they are a cooked food. If the lower court makes a finding of fact on that question on substantial and satisfactory evidence, then such finding is binding upon the appellate court and the appellate court should not examine questions of fact that have once been determined.

The Appellee feels that this is not primarily a question of interpretation of tariffs. The tariff needs no interpretation after a question of fact is determined. It is obvious that the application of the proper tariff is clear when the fact is found. If the Court finds as a matter of fact that the french fried potatoes are a frozen fresh vegetable then it is obvious that Item 4715 applies. If the Court finds that the french fried potatoes are a cooked food then it is obvious that Item 4600 is applicable. The Court in its opinion sets out the steps involved in the process and concludes from them that the product results in a cooked food and that it is not a frozen vegetable. On the other hand the lower court took the same facts and arrived at the conclusion that it was a frozen fresh vegetable and not a cooked food. The Appellant is necessarily asking that this court take the same testimony and find a different fact.

We feel that the finding is not a conclusion of law but rather a finding of fact.

We think this case can be distinguished from *West Coast Products Corp. vs Southern Pacific Co.* (9 Cir) 226 Fed. (2) 830. There the Court reviewed a process but they did not have a clear cut question of fact involved. They were construing the product in relation

to tariffs whereas in this case we have the undisputed testimony and from that a certain fact emerges, i.e., whether it is a frozen fresh vegetable or a cooked food.

The closest that the court can come to finding this to be classified under Item 4600 is to find that the product is partially cooked.

If it is partially cooked and partially raw, then it would fit either of the two classifications and the shipper would be entitled to the lower classification.

The question of construction of tariff provisions only comes into play after the question of fact is determined. If the facts are determined then of course *Great Northern Ry. Co. vs Merchants Elevator Co.*, 259 U. S. 285, 290 would apply. Then the construction of the tariff provision is a question of law and a simple one.

Respectfully submitted,
MARTIN P. GALLAGHER
Attorney for Appellee

See Vol. 3045

No. 15,583

**United States Court of Appeals
For the Ninth Circuit**

ALEX E. WILSON,

Appellant,

VS.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Co., debtor,

Appellee.

**Appeal from the United States District Court for
the Northern District of California,
Northern Division.**

APPELLANT'S OPENING BRIEF.

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No. 15,583

United States Court of Appeals For the Ninth Circuit

ALEX E. WILSON,

Appellant,

VS.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Co., debtor,

Appellee.

APPELLANT'S OPENING BRIEF.

Appeal from the United States District Court for
the Northern District of California,
Northern Division.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the District, Court, Northern District of California, Northern Division, rendered in a reorganization proceeding in which the Court refused to award to Appellant reasonable compensation for services rendered to the Debtor corporation, Coastal Plywood & Timber Co., while said Debtor corporation was in the midst of proceedings for the reorganization of a corporation under Chapter 10 of the Bankruptcy Act (U.S.C. Title XI, ch. 10, Sections 501 to 676). Appellant petitioned for compensation under Sections 241-250 of

the Bankruptcy Act (11 U.S.C. Sections 641-650) providing for compensation and allowance for services rendered to the Debtor estate in reorganization proceedings.

This appeal is taken under Section 250 of the Bankruptcy Act (11 U.S.C. Section 650) after the denial of Appellant's claim, and also under the provision of Section 23 and Section 25 of the Bankruptcy Act (11 U.S.C. Section 47 and Section 48), which gives the United States Court of Appeals appellate jurisdiction from the several Courts of Bankruptcy in their respective jurisdictions.

STATEMENT OF THE CASE.

The Appellant, Mr. Alex E. Wilson, filed his Petition for Allowance of Real Estate Broker's Commission with the District Court petitioning the Court for reasonable compensation for services rendered to the Trustee, and to Coastal Plywood & Timber Co., the Debtor corporation, in the sale of the assets of the Debtor corporation. (Tr. 19-31.) It is his contention that these services were rendered at the request of the Trustee and his attorney, and that these services were of great benefit to the trust estate. His petition was based on Sections 241-250 of the National Bankruptcy Act (11 U.S.C. Sections 641-650) which authorize an allowance of reasonable compensation for services rendered in connection with the administration of an estate in a proceeding under Chapter 10 of the Bankruptcy Act.

The evidence on the hearing of this petition established that Coastal Plywood & Timber Co., was a corporation with extensive timber holdings in Northern California, and that it had petitioned for reorganization of its affairs under Chapter 10 of the Bankruptcy Act. Mr. Fred Stevenot was appointed as Trustee for the Debtor corporation, and Mr. Sterling Carr was appointed as one of the attorneys for the Trustee. Mr. Alex E. Wilson was and now is a duly licensed real estate broker specializing in the sale of timber holdings. (Tr. 132-133.)

In approximately July, 1952, Mr. Sterling Carr, one of the attorneys for the Trustee, asked Mr. Wilson if he would help to sell the assets of Coastal Plywood & Timber Co. (Tr. 135.) Mr. Wilson subsequently discussed the sale of these assets with Mr. Stevenot, the Trustee, and was authorized to proceed with the sale of certain timber cutting contracts referred to as the Ricard, the Brush and the Reynold contracts (Tr. 135-136), and was authorized to proceed with the sale of certain timber rights referred to as the Garcia Tract. (Tr. 140-141.)

Following these conversations Mr. Wilson expended a great deal of time, effort and money in attempting to find purchasers for these timber cutting contracts and for the timber rights in the Garcia Tract. (Tr. 137-141.) During this time Mr. Wilson was continually in contact with the Trustee, Mr. Stevenot, by personal visits in his office, by telephone, and by letter, keeping him advised of the status of his negotiations,

the people he had called on, and the people he hoped to interest in the purchase of these assets. (Tr. 142.)

Finally, in October, 1952, Mr. Wilson submitted to Coastal Plywood & Timber Co., an offer from Mr. Clarence Nielson for the purchase of the said timber cutting contracts for the sum of \$100,000.00. (Petitioner's Exhibit No. 1, Tr. 145-146.) This offer on behalf of Mr. Nielson in the sum of \$100,000.00 was accepted by the Trustee, submitted to the Court, and approved by the Court. (Tr. 3-18.) In connection with the approval of this sale of these cutting contracts the Court authorized the payment of a real estate broker's commission to Mr. Wilson in the sum of \$5,000.00, which is a normal real estate broker's commission of 5% on the total purchase price. The order of the Court, dated November 12, 1952, authorizing payment of the said real estate commission reads as follows:

“That Fred G. Stevenot, as Trustee herein, be, and he is hereby authorized to pay to A.W. Wilson, from said sum of 100,000.00 a commission on said transaction in the amount of \$5,000.00.”
(Tr. 18.)

This real estate commission was paid to Mr. Wilson by Coastal Plywood & Timber Co., check in the sum of \$5,000.00. The stub of this check was introduced as Petitioner's Exhibit No. 2 and reads as follows: “Commission—sale of cutting contracts—\$5,000.00”.
(Tr. 147.)

Following the sale of these timber cutting contracts to Clarence Nielson, Appellant continued in his efforts

to sell the Garcia Tract again expending a great deal of his time, effort and money and further continued in his practice of keeping Mr. Stevenot informed of his progress by personal visits, telephone and letter. Mr. Stevenot cooperated in every way by supplying Mr. Wilson with their timber cruisers and maps of the property (Tr. 270), and by giving him permission to show the property to prospective purchasers (Tr. 315) and by encouraging him in his efforts to sell this timber.

There is evidence that during the course of the negotiations for the sale of both the timber cutting contracts to Clarence Nielson and the Garcia Tract that the Trustee advised Appellant that he should obtain his compensation from the Buyer, and that the estate would not be responsible for his commission. Appellant admits that conversations were held with the Trustee wherein he was advised that he should look to the buyer for his commission, but Appellant testified that he stated to Trustee that this was impossible; that the seller always paid the real estate commission and not the buyer; and that Appellant didn't think it was possible to get his commission from the buyer, but that he would try to do so. There was never any agreement between Appellant and the Trustee that Appellant would look only to the buyer for his commission. At page 137 of the Transcript the following testimony appears:

“Q. What did you reply to that?

A. (Wilson.) Oh, I told Mr. Stevenot then, as I have told him many times, I said, ‘Well, that

is a very difficult thing to do; the buyer never pays, the seller always pays. I will try to do it, but I don't think I can'.

Q. Did you ever agree with Mr. Stevenot in regard to these contracts that we are now discussing that you would obtain your commission from the buyer.

A. No, never; it was always a question of him saying, to try and get it from the buyer and my saying, 'Mr. Stevenot, I can't get it from the buyer.' "

In spite of the conversations in regard to compensation the Trustee continued to urge Appellant to sell these assets. At page 273 of the Transcript the following testimony appears.

"Q. Did Mr. Stevenot ever tell you not to proceed if you could not get your brokerage from the buyer?

A. (Wilson.) No, quite the contrary; he urged me at all times to sell it, to continue to attempt to."

Appellant was paid his real estate broker's commission by the Trustee and the Debtor estate when he sold the timber cutting contracts to Clarence Nielson, and Appellant reasonably believed that he would be paid his commission by the Trustee in this matter if he was successful in selling these assets. The following testimony appears at page 272 of the transcript.

"A. (Wilson.) These conversations would take place in his office, Mr. Stevenot would tell me that he didn't want to pay me and he would say, 'Alec, I want you to get your commisison from the buyer.'

I would retaliate saying, 'Mr. Stevenot, you can't do that. In my 33 years as a broker I have never received a commission in my life from a buyer.' Mr. Stevenot would follow the same pattern in the next meeting, always stated he wanted me to get the commission from the buyer.

I asked him one day, I said, 'Mr. Stevenot, why do you take that particular position? You know that that is an impossible thing to do.'

He said, 'Well, I have a lot of fees to pay, I have got my own fee, and the attorney's, and I *just want* to go before the Court and ask for additional fees.'

Q. Mr. Wilson, during these discussions did you ever reach a definite understanding with Mr. Stevenot that you would not obtain your commission from Coastal?

A. Never a definite understanding, no, until the 22nd day of July and then I had a definite understanding.

Q. Did you ever have a definite understanding with him that you would obtain your commission from the buyer?

A. No, and I believed that he would pay me, because he followed the same pattern when I sold the Nielson deal, he always told me he wouldn't pay me, but he did pay me in the final analysis"

...

During the course of these negotiations Appellant, Alex E. Wilson, discussed the sale of these assets at various times with Mr. Sterling Carr, one of the attorneys for the Trustee. In the course of these conversations Appellant was assured by Mr. Carr that he would be paid for his services if he was successful in

selling these assets of Coastal Plywood, and Mr. Carr encouraged him to continue his efforts to sell these assets with the assurance that in the final analysis he would be paid by the Trustee for his services. At page 273 of the Transcript the following testimony appears:

(Wilson.) “. . . I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn’t pay me. Mr. Carr would urge me to continue. He said ‘Stevenot is quite a decent fellow, he won’t do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman *and he will pay you.*’ ” (Emphasis added.)

Again at pages 306-307 of the Transcript appears testimony of the Appellant under cross-examination concerning his conversations with the attorney for the Trustee:

“Q. Do you deny that the Trustee told you that if you worked on any proposal that you must act for the proponent, get your compensation from the proponent? (209.)

A. (Wilson.) Oh, Mr. Stevenot told me that all the time. He told me that with the Nielson deal, he never wanted to pay me—he said, ‘I don’t want to pay you, I don’t want to go before the Court.’ Mr. Carr, of course told me all the time, ‘You don’t have to pay any attention to that because after all he has no authority to pay you, he hasn’t any authority to give you a contract.’ He says, ‘We want to sell it and he wants to sell it, and I am going to see that the stockholders get dollar for dollar, and you will have to bring in—Alex, you will have to bring in an offer where the

stockholders are going to be protected, that is what I am mostly interested in, and everyone else, and then we can sell it.' But he said, 'If Mr. Stevenot takes this position that he won't pay you, then you must appeal to the Court. That is your refuge, and you will be treated honestly if you complete the deal and save this institution.' "

It is important to note that this testimony in regard to conversations with Mr. Carr stands uncontradicted in the record. Although Mr. Carr was one of the attorneys for the Trustee, he was not called to refute any of this testimony.

At various times Mr. Stevenot discussed with Appellant the terms of the sale which he wished to obtain for the assets of Coastal Plywood. These assets consisted of a sawmill, a log deck, rolling stock, 585,000,000 feet of timber and 36,000 acres of land. (Tr. 250.) Appellant suggested that he could probably obtain more money for the stockholders if he sold these assets piecemeal, but Mr. Stevenot insisted that all of these assets be sold in one sale. (Tr. 252.) Mr. Stevenot also insisted that the purchaser have sufficient cash to pay off all administration expense and the secured creditors, and suggested that an offer of \$4,000,000.00 with substantial people would probably be approved. (Tr. 253-254.)

Appellant continued in his efforts to find a purchaser for these assets (Tr. 255-260), and estimates that his actual time and expense in this regard were worth approximately \$20,000.00. (Tr. 261.) He continued to keep the trustee informed of his activities

and efforts by personal conversation, telephone calls and letters, and the Trustee was fully aware that Appellant was going to a great deal of expense and effort to obtain a purchaser for these assets. (Tr. 262-270.)

Finally, in April, 1953, Appellant began negotiations with the Sugarman interests through Mr. William Steinberg, an attorney in San Francisco. (Tr. 275-276.) The Sugarman interests insisted that before they could offer to purchase all of these assets of Coastal Plywood in one purchase as the Trustee required, it would be necessary to make some provision for the resale of these assets to other parties. (Tr. 278-279.) Appellant was able to arrange for these resales, and as a result on July 22, 1953, a written offer was delivered to the Trustee on behalf of the Sugarman interests for the purchase of the assets of Coastal Plywood. (Petitioner's Exhibit No. 3, Tr. 157-159.) The sale of these assets was eventually consummated to Sugarman Lumber Co., a corporation formed by the Sugarman interests to take over these assets. (Tr. 176-177.) The final gross sale price was \$4,352,000.00. (Tr. 386.) Appellant was excluded from the final negotiations between the Trustee and the Sugarman interests which resulted in this sale, and was never informed as to when the meetings between these parties were to take place. (Tr. 320, 407.) No provision was made in these negotiations between the Trustee and the Sugarman interests for the payment of any compensation to Appellant.

There is no question but that Appellant introduced the Sugarman interests to the Trustee, and that he

was the procuring cause of the sale. This was admitted by the Trustee from the witness stand, this testimony appearing at page 319 of the Transcript.

“Q. Mr. Hildebrand. But Mr. Wilson and Mr. Steinberg were the people who brought Sugarman to you, weren't they?

A. Mr. Stevenot. I am telling you, I don't deny that.”

The testimony discloses and the Trustee has stipulated, that this sale procured by Mr. Wilson was most beneficial to the Debtor estate. This stipulation appears at page 388 of the Transcript:

“Mr. Olson. I will stipulate, your Honor, that the second plan of reorganization which encompassed this sale was most beneficial to the estate.”

It is apparent from the testimony that this sale for which Appellant was responsible resulted in preventing the Debtor corporation from going into bankruptcy, and resulted in payment of the creditors in full, and in allowing substantial returns to the shareholders. It is equally apparent that if it had not been for the efforts of Appellant the property would have been foreclosed by Bank of America and R.F.C. and that the stockholders and other creditors would have received nothing. (Tr. 271.)

The lower Court was satisfied that Appellant had rendered services with the full knowledge, cooperation and encouragement of the Trustee and his attorney; that the services were accepted by the Trustee, and that the services were of real benefit to the bankrupt

estate. (Tr. 51—Memorandum Opinion.) However, the lower Court felt that Appellant was a volunteer, and that no obligation to pay for these services was created. In addition, the lower Court felt that the warning by the Trustee that the estate would not pay any broker's commission prevented a recovery by Appellant. Finally, the Court said "To torture an agreement to pay a commission out of these facts would be to create an implied contract where none in fact existed. Equity can enforce the contract, whether express or implied, but equity cannot make the contract for the parties where there was in fact no understanding upon which a contract could be founded." (Tr. 54-55.)

In response thereto Appellant's position in summary is that the acceptance by the Trustee of services rendered at his request, which were of great benefit to the bankrupt estate, created an obligation both at law and in equity to pay for these services, and that the Bankruptcy Court should have awarded reasonable compensation to Appellant for these beneficial services to the bankrupt estate under Sections 641-650 of the Bankruptcy Act (11 U.S.C. 241-250), under the applicable cases, and under the general law of implied in fact and quasi contract.

The evidence shows that Appellant always advised the Trustee that he could not obtain his compensation from the buyer, and that irrespective of these statements by the Trustee, that Appellant continued to look to the seller, the bankrupt estate, for his compensation. Furthermore, it is evident that although Appellant

produced the purchaser of the assets he was in effect foreclosed from negotiating a broker's commission from the buyer because the Trustee excluded Appellant from the final sale negotiations and thereby exercised unlawful dominion over the services of the Appellant, and if seller does not pay for the said services it would result in an unjust enrichment of the seller at the expense of Appellant. Appellant further contends that he was justified in so looking to seller for his compensation irrespective of these warnings by the Trustee in view of the statements to Appellant by Sterling Carr, attorney for the Trustee, that Appellant would be paid by the Trustee if he sold these assets, and in view of the fact that Appellant had been paid a real estate broker's commission by the Trustee in the Nielson transaction under identical circumstances and after exactly the same statements by the Trustee that the estate would not be responsible for his compensation. Accordingly, the Trustee and the Debtor estate should be estopped from denying Appellant reasonable compensation.

Appellant further contends that under the law of quasi contract the acceptance of the benefits of Appellant's services by the Trustee knowing that they had been rendered with the expectation of compensation created an obligation to pay for these services irrespective of the intent of the parties and even in the face of an expressed intention not to pay. Finally, it is evident that Appellant was not an officious volunteer because his services were rendered with the full knowledge, cooperation and encouragement of the Trustee

and his attorney, and Appellant, therefore, should not be denied compensation on that ground.

SPECIFICATION OF ERRORS.

The following is a list of the errors which Appellant intends to urge on appeal:

1. That the District Court erred in not finding that Appellant should be allowed a reasonable compensation for his services rendered to the Debtor in this reorganization proceeding at the special instance and request of Trustee, which services were accepted by the Trustee and admittedly of great benefit to the Debtor's estate.

2. That the District Court erred in not finding an implied in fact contract between Appellant and the Trustee of the Debtor's estate to pay Appellant a real estate broker's commission for his services in finding a buyer who purchased the assets of Debtor's estate for the gross sum of approximately Four Million Three Hundred Fifty-two Thousand Dollars (\$4,352,000.00) which services were accepted by the Trustee and admittedly of great benefit to the Debtor's estate.

3. That the District Court erred in not finding an implied in law or quasi contract between Appellant and the Trustee of Debtor as a matter of equity to pay the reasonable value of services rendered to Debtor's estate which were accepted

by the Trustee and admittedly of great benefit to Debtor's estate, irrespective of the intent of the Trustee.

4. That the District Court erred in not finding that the District Court sitting in bankruptcy by virtue of its inherent equitable powers and as a matter of sound public policy should award compensation to Appellant for valuable services rendered to, accepted by and of great benefit to Debtor's estate.

5. The District Court erred in not finding an express contract or implied in fact contract between Appellant and Debtor's estate based upon the assurances by Sterling Carr, attorney for the Trustee and agent of Debtor's estate, that Appellant would be paid a real estate broker's commission if he found a purchaser for the assets of Debtor's estate.

6. The District Court erred in not finding that the representations of Sterling Carr, attorney for the Trustee, who assured Appellant that he would be paid if he found a purchaser for the assets of Debtor's estate, were binding on Trustee and on Debtor's estate.

7. That District Court erred in refusing to compensate Appellant as a matter of equity for valuable services rendered to and accepted by Debtor estate, particularly since Appellant was encouraged to proceed and promised compensation therefor by an agent of the Trustee.

8. That District Court erred in finding that Appellant was to obtain his brokerage commission from Buyer for the said sale of the assets of the Debtor's estate, and that he was a volunteer.

9. That District Court erred in not finding that Appellant reasonably relied upon the Nielson transaction, which was a prior sale of similar assets of the same Debtor's estate, under similar circumstances, and for which Appellant was paid a brokerage commission in the sum of Five Thousand (\$5,000.00) Dollars by a check of the Debtor's estate; and in not finding that by virtue thereof Appellant proceeded to find a buyer of the remaining assets of Debtor's estate, in good conscience and in good faith, believing he would be similarly compensated.

10. The District Court erred in not estopping Trustee from refusing payment of a brokerage commission to Appellant, in view of the fact that Trustee paid Appellant under similar circumstances in the Nielson transaction, on which Appellant reasonably relied and rendered his services and incurred expense to find the buyer of the said assets and as a result thereof expected compensation therefor.

11. The Trial Court erred in not finding that Petitioner expended a great deal of effort and incurred a great deal of expense in producing a buyer of the Debtor's estate, and that in so doing he acted in good faith and reasonably believed, because of the Nielson transaction and the repre-

sentations of the Trustee and by his attorney and agent, that he would be compensated for his services.

12. That by reason of the law and evidence Appellant is entitled to a Judgment for a real estate broker's commission, or for reasonable compensation for services rendered to Debtor's estate which were of great benefit to Debtor's estate.

13. That the evidence does not support the Findings of Fact and Conclusions of Law made and entered by the District Court.

14. That the Order denying compensation made and entered by the District Court is not supported by the law.

ARGUMENT.

I.

THE CIRCUMSTANCES OF THIS CASE COMPEL THE COURT TO ALLOW COMPENSATION FOR THE SERVICES RENDERED BY APPELLANT AT THE REQUEST OF THE TRUSTEE, ACCEPTED BY THE TRUSTEE, AND OF GREAT BENEFIT TO THE BANKRUPT ESTATE.

The facts of this case show that the Trustee, and his attorney, Sterling Carr, requested that Appellant find a purchaser for the assets of the bankrupt corporation, and that they continually encouraged Appellant in his efforts to secure a purchaser for these assets. (Tr. 270, 273.) After a great deal of work and expense, Appellant procured Sugarman Lum-

ber Company as the purchaser of these assets. (Tr. 319.) The result of his services in procuring said purchaser were freely accepted by the Trustee, and it has been stipulated that these services were of great benefit to the bankrupt estate. (Tr. 297.) The said services were performed with the expectation of compensation, and were not intended to be gratuitous. After the purchaser had been procured by Appellant as requested, the evidence shows that the purchaser was taken by the Trustee without any thought or provision for compensating Appellant. (Tr. 320, 407.) There is no question but that these services rendered at the request of the Trustee and his agent, freely accepted by the Trustee, and of great benefit to the bankrupt estate created an obligation to pay for them which is recognized both at law and in equity and in proceedings under the Bankruptcy Act.

There can be no doubt that a Bankruptcy Court is a Court of equity and has broad equitable power (8 Corpus Juris (2d) 429, Section 21); that these equitable powers apply in the allowance of claims in bankruptcy proceedings in order to see that injustice or unfairness is not done in the administration of the bankrupt estate; (8 Corpus Juris (2d) 430-431, Section 22; *In re Avery*, 114 Fed. (2d) 768; *Interstate National Bank v. Luther*, 221 Fed. (2d) 382; *In re Commonwealth & Power Co.*, 141 Fed. (2d) 734); and that the Bankruptcy Court will look to the substance of the transaction rather than to the form toward the end that fraud will not prevail and that technical consideration will not prevent substantial

justice from being done. (*Pepper v. Litton*, 308 U.S. 294, 60 Sup. Ct. 238; 84 L. Ed. 281.) The rule which clearly is deducible from the authorities is that where a party designated by the act renders service in connection with the proceeding and plan the Court may not, without some special justification, refuse to allow any compensation whatever. (*In re Building Development Co.*, 98 Fed. (2d) 844, 846); that for successful administration of the statutes it is as important that committees who have earned something get some compensation as it is that they should not get too much. (*In re Prudence Co., Inc.*, 93 Fed. (2d) 455, 456) and that a very broad discretion is lodged in the chancellor in the allowance and fixing of fees which discretion must be exercised with judgment and with the double purpose of doing equities to those distressed and at the same time rewarding faithful and necessary service with reasonable compensation. (*In re Herz Inc.*, 81 Fed. (2d) 511, 512.)

Certainly these equitable powers of the Bankruptcy Court should be applied in this case to compensate the Appellant whose services have been of immense benefit to the bankrupt estate. It is submitted that people, such as Appellant, should be encouraged to try to help the bankrupt estate, rather than being discouraged by a refusal of any compensation when their services have been accepted and of benefit to the estate. When a man like Appellant has prevented the assets of this estate from being foreclosed by procuring a sale of those assets for a sum in excess of \$4,325,000.00 he should be reasonably compensated if it is at all possi-

ble for him to be compensated. It is apparent from the testimony that if it had not been for the services of Appellant in obtaining a purchaser for the assets of this estate we might well conclude that the Bank of America and R.F.C. would have foreclosed for the amount due, and the stockholders and creditors would have received nothing. (Tr. 403.) As a result of Appellant's efforts a sum in excess of \$4,325,000.00 was received on the sale of these assets, and this sum will enable the creditors and stockholders to be paid in full. In fact, everyone including the Trustee has been paid except Appellant who services made all of these other payments possible.

While the lower Court recognized that these services had been rendered with full knowledge, cooperation and encouragement of the Trustee and his attorney, were accepted by the Trustee, and were of great benefit to the bankrupt estate, it felt that conversations between the Trustee and Appellant during the course of their negotiations wherein the Trustee advised Appellant that he should obtain his compensation from his buyer prevented Appellant's recovery or compensation in this matter. However, it is clear that Appellant never agreed that he would obtain his compensation from the buyer. Appellant always protested that he did not think it possible to obtain his compensation from the buyer, and that the seller always paid the commission in a real estate transaction. Appellant always believed that in the final analysis he would be paid by the Trustee if he could not obtain his compensation from the buyer. Ap-

pellant was certainly justified in this belief. The Trustee had made identical statements to him in regard to the Nielson transaction. However, when the buyer would not pay his commission, a commission of 5% of the sale price was paid by the bankrupt estate. Appellant also discussed these conversations with Sterling Carr, attorney for the Trustee, and was advised that in spite of the said statements by the Trustee he would be paid if he sold these assets.

A. The Nielson Transaction.

Appellant was requested by the Trustee and his attorney to obtain a purchaser for certain cutting contracts, but was warned by the Trustee that he should obtain his compensation from the buyer. The situation was identical with the transaction now before this Court. Appellant told the Trustee that he did not believe that he could obtain any compensation from the buyer and that it would be very unusual if he could, but that he would try. Appellant secured Clarence Nielson as the purchaser of these cutting contracts. As Appellant had anticipated, the buyer refused to pay any compensation to Appellant, stating the buyer never paid the commission, and that the commission should be paid by the seller as was the usual situation. There is evidence of a conference between the Trustee and Clarence Nielson wherein the Trustee attempted to get Mr. Nielson to pay the commission, or to increase his offer so that the estate would net \$100,000.00 after the payment of a commission to Appellant. Mr. Nielson refused to do either, and refused to pay more than the sum of \$100,000.00

for these cutting contracts. In the face of this refusal by Mr. Nielson to pay a commission, the Trustee, knowing that he must pay the broker's commission if he intended to complete this sale to the purchaser procured by Appellant, agreed to pay the commission of Appellant. The Trustee petitioned the Court for the approval of the sale, and for the payment of a commission of \$5,000.00 to Appellant. No prior authorization for Appellant's services had been obtained from the Court. There was no contention made in the Nielson transaction that Appellant was a volunteer. The payment of this \$5,000.00 commission was approved by the Court and was paid by check of Coastal Plywood & Timber Co., the Debtor corporation, to Appellant.

The conduct of the Trustee in paying a commission to Appellant on the sale of these cutting contracts in the Nielson transaction, in spite of warnings that Appellant should obtain his compensation from the buyer, certainly confirmed Appellant in his belief in this case that if he procured a purchaser who refused to pay the commission the Trustee would pay him before he accepted the benefit of his services. In accord with this belief that he would be paid Appellant proceeded with the sale of the balance of the assets of Debtor which are the subject of this proceeding. As Appellant testified, the Trustee paid him before under identical circumstances, and he thought that he would pay him this time. This feeling was strengthened by the statements of Sterling Carr, the attorney for the Trustee, that if Appellant sold these assets,

he would be paid. It seemed apparent to Appellant in view of the assurances of Sterling Carr and the conduct of the Trustee in the Nielson transaction that, if Appellant was not successful in obtaining his compensation from buyer, then, of course, the Trustee in the final analysis would pay his commission if he wished to accept the benefit of the purchaser produced by Appellant, and if he wished to complete the sale to such purchaser. It was in this belief that he would be paid for his services that Appellant continued his search for a purchaser of these assets and completed this sale.

B. Statements by Sterling Carr That Appellant Would Be Paid.

According to the undisputed evidence in this case, Mr. Sterling Carr, the attorney for the Trustee, on various occasions and over a period of time, encouraged Appellant to find a buyer for the assets of the bankrupt estate, and said attorney told Appellant he would be paid for his services. Mr. Carr was not called by the Trustee to refute any of this evidence in regard to his conversations with Appellant, and the evidence of these conversations is undisputed in the record. These statements were obviously made in an effort to keep Appellant active in his search for a purchaser of these assets. The statements of this attorney for the Trustee on one of these occasions appears at page 273 of the Transcript.

“(Wilson.) I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn't pay me. Mr.

Carr would urge me to continue. He said, 'Stevenot is quite a decent fellow, he won't do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman *and he will pay you*' ''.

Here is the uncontradicted and unequivocal statement by the attorney and agent of the Trustee to Appellant that he would be paid for his services. This statement alone, without any of the other equitable circumstances of this case, would compel the payment of compensation to Appellant in this matter.

Again at pages 287-288 of the Transcript the following uncontradicted statement by Mr. Sterling Carr appears:

“(Wilson.) Mr. Carr said, ‘I was never so shocked in all my life, I can’t believe it, I can’t believe that this is true’. He said, ‘Alec, you go along just exactly the way you are going, don’t say anything about it, because if Mr. Stevenot is going to treat you that way after you have raised all this money and sold this property, then the only thing you can do is seek refuge with the court, because, after all, Mr. Stevenot hasn’t got any legal right to give you a contract. Mr. Stevenot hasn’t any legal right to set your fee, and you go right along, because you have been honest in this thing and you have worked hard and we needed this money so badly, and when the deal is closed, if he still doesn’t pay you and you sue for it you can feel perfectly safe that the Courts of this state will treat you justly’ ”.

Appellant has now appealed to the equity and justice of this Court for compensation for these services which the agent of the Trustee unequivocally stated would be paid. In all equity and justice, under the circumstances of this case, and to prevent an unjust enrichment at the expense of Appellant, he should be paid the reasonable value of the said services. It is apparent that Appellant was misled throughout this transaction by the conduct of the Trustee and the statement by his agent that he would be paid for his services. Appellant performed these services in the justifiable belief and with the reasonable expectation that he would be paid, and he should be paid in accord with the benefit received by this estate.

With reference to the opinion of the lower Court that Appellant was a volunteer, attention is invited to the fact that compensation to a volunteer is usually denied only if his acts were officious. In view of the aforesaid facts demonstrating full knowledge, cooperation, encouragement and acceptance of Appellant's services by the Trustee of the Debtor estate, Appellant cannot be accused of officious conduct. Accordingly, reasonable compensation should not be denied on that ground.

C. The Trustee Prevented Any Possibility of Appellant Being Paid by the Buyer.

The evidence in this case is also clear that the Trustee himself conducted the final negotiations for the sale of these assets directly with the Sugarman Lumber Company, the purchaser procured by Appellant,

and the Trustee excluded Appellant from these negotiations. (Tr. 320, 407.) This conduct of the Trustee prevented any possibility that Appellant might have had of being paid by the buyer, or of protecting himself in obtaining compensation from one of the parties to the transaction. It is unusual for a broker to obtain his compensation from the buyer; it is impossible to obtain compensation from the buyer; when the Trustee takes his buyer from him, deals directly with the buyer himself, and excludes the broker from the negotiations. This conduct by the Trustee in effect is a tortious conversion of Appellant's services, and constitutes unlawful dominion by the Trustee over the services furnished by Appellant.

It seems inconceivable that the Trustee under these circumstances should attempt to rely on statements he had made many months before to Appellant that he should obtain his compensation from the buyer when, by his own conduct, he prevented Appellant from participating in the final negotiations for the sale, and made it impossible for Appellant even to attempt to get his compensation from the buyer. In the Nielson transaction, which had been conducted under similar warning, Appellant participated in the negotiations and was able to protect himself in the payment of his commission. Now the Nielson transaction had occurred again. The buyer refused to pay any commission or compensation because that was not the obligation of the buyer.

The Trustee was fully aware of the fact that the Sugarman interests refused to pay the commission,

and the Trustee knew that the exclusion of the broker from these negotiations would certainly prevent and foreclose any possibility the broker might have of being paid by the purchasers. (Tr. 159, 320.) With full knowledge of these facts, and being perfectly free to accept or reject the services of Appellant, the Trustee accepted the purchaser and the benefit of these services. It is submitted that when the Trustee accepts the benefit of the said services by Appellant under these circumstances the law will in good conscience and equity raise an obligation to pay for these services. No one compelled the Trustee to accept the benefit of Appellant's work. Of his own free will the Trustee accepted the benefit of these services rendered at his request, knowing that no provision had been made for the payment of Appellant, and knowing that the buyer had refused to pay any commission. Under these circumstances the Trustee, as a matter of law, accepts the obligation to pay for these services when he accepts their benefits. This is the law of quasi contract, and this is the law applicable to this case. Any statement by the Trustee in regard to the manner of paying Appellant must give way to the conduct of the Trustee in taking Appellant's purchaser and preventing any other manner of payment for the reasonable value of these services requested by the Trustee and freely accepted by the Trustee when they had been rendered.

In summary, the facts of this case show a course of conduct by the Trustee and statements by his agent which led the Appellant on in search for a purchaser

of these assets in the justifiable belief that he would be paid for his work if it was successful. The Trustee had paid his commission for services previously rendered under identical circumstances in the Nielson transaction, and the attorney for the Trustee told him that he would be paid for his services in this sale. When Appellant did procure a purchaser for these assets, the Trustee commenced direct negotiations with this purchaser, and excluded Appellant therefrom thereby preventing any possibility of Appellant obtaining his compensation from any source other than the Trustee.

Appellant contends that upon the facts of this case he is entitled as a matter of justice and equity to reasonable compensation for services rendered in the administration of this estate. The Bankrupt Act, Sections 241-242, authorize the payment of compensation to Appellant for his services in this matter, and the applicable cases authorize the allowance of compensation to a real estate broker under almost identical circumstances. Appellant also contends that both under the law of implied in fact contracts resulting from the conduct of the Trustee, and under the law of quasi contract imposed by the law irrespective of the intent of the parties there is an obligation to pay reasonable compensation for these beneficial services rendered by the Appellant and accepted by the Trustee in this case.

II.

THE ALLOWANCE OF REASONABLE COMPENSATION TO REAL ESTATE BROKERS FOR SERVICES RENDERED IN CONNECTION WITH THE ADMINISTRATION OF AN ESTATE IN REORGANIZATION PROCEEDINGS IS AUTHORIZED BY SECTIONS 241 AND 242 OF THE BANKRUPTCY ACT.

The Bankruptcy Act, Sections 241-250 (11 U.S.C. Sections 641-650) provides for the allowance of reasonable compensation for services rendered in connection with the administration of an estate in reorganization proceedings. Section 242 of the Bankruptcy Act provides as follows:

“Sec. 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.”

These Code sections are clear authority for the allowance of the claim of Appellant in this action for his services rendered at the request of the Trustee and his agent, and accepted by the Trustee when a

purchaser was procured by Appellant for the assets of this estate. This sale was admittedly of great benefit to the Bankrupt estate, and it is submitted that Appellant should now be paid reasonable compensation for his services in this reorganization proceeding.

III.

THE ALLOWANCE OF REASONABLE COMPENSATION TO A REAL ESTATE BROKER FOR HIS SERVICES IN THE ADMINISTRATION OF AN ESTATE IN REORGANIZATION PROCEEDINGS WAS AUTHORIZED IN THE BERMAN CASE UNDER ALMOST IDENTICAL CIRCUMSTANCES AND IS AUTHORIZED BY OTHER BANKRUPTCY CASES.

In the case of *Berman v. Palmetto Apartments Corporation*, 153 Fed. (2d) 192 (1946; C.C.A. 6 Michigan) the Circuit Court reversed a District Court which had refused to allow compensation to a real estate broker who had rendered services in a reorganization proceedings to the bankrupt estate in the sale of its assets.

The factual situation in the *Berman* case and in this case are almost identical, and the legal question presented in this matter, and the legal questions before the Court in the *Berman* case, are equally similar.

In the *Berman* case, as in this case, the Debtor corporation was in the midst of reorganization proceedings under Chapter 10 of the Bankruptcy Act, and a Trustee had been appointed. Berman was a licensed real estate broker, and had many conversations with the Trustee in regard to the sale of an

apartment house which was the principal asset of the Debtor corporation. Berman had no written contract with the Trustee, and had not obtained any prior Court authorization for his services. Berman finally obtained an offer from a Mae Hess, a nominee of the final purchaser, which was submitted to the Trustee and accepted. This sale was submitted to the Court for approval. While this sale was under advisement by the Court, the true purchaser submitted an increased offer, which offer was finally confirmed by the Court without mention of a real estate commission to Berman. Berman filed a petition for an allowance of a real estate commission contending, among other things, that he was entitled to compensation for services rendered which benefited the Trustee and the trust estate. The lower Court denied his petition, and the Circuit Court reversed using the following language:

“The District Court denied his petition altogether. The Court filed an opinion which contained a finding that there was no valid existing contract between Appellant and the Trustee for the payment of a commission to Appellant. Conceivably this may be true because the contract never had the sanction or approval of the Court, but we are not limited to a consideration of the strict legal right of the parties.” *O’Hara v. Oakland County*, 6 Cir., 136 Fed. (2d) 142.

“Appellant’s case cuts deeper than this. The District Court was sitting in Bankruptcy and under the Bankruptcy Act had equitable jurisdiction. It is generally held that a selling agent is entitled to compensation if his agency is the procuring

cause of the sale, and when his communication with the purchaser have been the means of bringing the purchaser and his principal together, his right to compensation is complete." (Citing many cases.)

"It is unquestionably true that Appellant, on behalf of the Trustees, was actively instrumental in procuring the first offer of the purchaser. It is crystal clear that he was the 'procuring and inducing cause' of the sale. The withdrawal by Mae Hess of the original offer did not nullify his claim for she, as pointed out, was no more than a dummy for the purchasers. Her withdrawal and the second offer of the purchasers amounted simply to a raised bid by the purchasers. The original offer, the withdrawal of it and the subsequent offer, confirmed by the Court, were phases of a continuing transaction which resulted in the sale and in which Appellant certainly had equitable if not legal rights, since at the behest of the Trustee and after diligent effort, he found the purchaser. . . ."

"The District Court was authorized to make an allowance (Title 11 USCA Sections 641 and 642), and we think that the failure to do so was error."

It is this same equitable claim for compensation for services rendered to the bankrupt estate in a reorganization proceedings under Title 11 USCA, Sections 641 and 642, which Appellant now claims in this proceeding.

The *Berman* case is almost on all fours with the case now before this Court, and is abundant authority for the allowance of reasonable compensation to the

Appellant for his services in this matter. It is submitted that among other things, the *Berman* case stands for the following propositions which are applicable in this case.

(1) That the District Court sitting in bankruptcy in a corporate reorganization proceeding has equitable jurisdiction, and is not limited to a consideration of the strict legal rights of the parties involved.

(2) That a real estate broker is entitled to an allowance for the reasonable value of services rendered to the Trustee in a reorganization proceeding where his services have benefited the trust estate.

(3) The Bankruptcy Court is authorized to make an allowance for services rendered by a real estate broker under Sections 241 and 242 of the Bankruptcy Act.

(4) That the Bankruptcy Court is authorized to make an allowance to a real estate broker in a reorganization proceeding where his services have been of benefit to the estate even though the employment of the broker has not had prior authorization by the Court.

(5) That a real estate broker is entitled to compensation if his agency is the procuring cause of the sale, and when his communications with the purchaser has been the means of bringing the purchaser and the principal together, his right to compensation is complete.

In addition to the *Berman* case, Appellant invites the Court's attention to the case *In re Industrial Ma-*

chine & Supply Co. (1953), 112 Fed. Sup. 261, 264, involving a petition for allowance in a reorganization proceeding by a wife who in a most informal manner had assisted her husband in the administration of an estate of which he had been appointed Trustee. Her services had never been authorized by the Court, nor was a definite designation given her by the Trustee as an employee of the Debtor. Nevertheless, the Court did find that direct benefit had accrued to the Debtor from her services and upon that basis reasonable compensation was awarded to her for these services. In this case the Court again recognized the equitable claim of the claimant based upon the benefit that her services had been to the estate, and reasonable compensation was awarded accordingly.

Petitioner also called to the Court's attention the case of *In re Buildings Development Co.*, 98 Fed. (2d) 844, in which the Court in awarding compensation used the following language:

"The rule which clearly is deducible from the authorities is that where a party designated by the act renders services in connection with the proceedings and plan the Court may not, without some special justification, refuse to allow any compensation whatever. For successful administration of the statute it is as important that committees who have earned something should get some compensation as it is that they should not get too much. *In re A. Herz, Inc.*, this Court remarked 'that the discretion thus lodged by statute in the Court must be exercised with judgment and with the double purpose of doing equity to

those distressed and at the same time rewarding faithful and necessary service with reasonable compensation.”

The case of *In re Irving-Austin Building Corporation*, 100 Fed. (2d) 574, was an action for allowance of attorney’s fees for services rendered to a bankrupt estate during reorganization proceedings under Chapter 10 of the Bankruptcy Act. The Court in that case states what Appellant feels is the correct rule in awarding allowances in these reorganization proceedings. The Court states as follows:

“Benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured where no employment by the Court or Trustee exists.” (Emphasis added.)

“This conclusion is confirmed by a study of the rulings in the analogous fields of contract law. Liability for debts is traceable to contractual origin. Express or implied promises are prerequisites to debt liabilities. When A contracts with B for the latter’s services, a case of express agreement arises. The amount of compensation is fixed by the contract or the law inserts the measure of damages known as quantum meruit. If no contract exists and services are rendered, liability arises only when the results and the benefits of the services are accepted by the other party in which case liability arises out of such acceptance of the fruits of the other’s labor. In all such cases liability is measured not by the amount of time and energy expended by the laboring party but by the value of such services to the beneficiary.”

The Court in this case makes it clear that an allowance may be made in reorganization proceedings even when there is no contract with the Trustee, and that the true criteria for an allowance in bankruptcy proceedings under these circumstances is benefit to the estate. This rule is in complete accord with contract law which allows recovery in the amount fixed in the contract when agreed upon, in a reasonable amount if no compensation is fixed in the contract, and in the amount of the benefit received when no contract exists at all but the services are rendered and accepted. The latter is a quasi contractual recovery. The Court goes on to state why this rule is applied in reorganization proceedings:

“This rule not only protects the estate against overcharging for valueless services, but it enables the Court to thoroughly compensate counsel for beneficial services. The protection of counsel who render valuable constructive services is quite as important as protecting the estate against overcharges for services which were of no benefit to the estate. And it should be added that Courts must recognize of necessity a vast difference between the value of successful legal services which create a fund to be distributed, and the value of services which are devoted to an equitable distribution of funds in existence when the reorganization proceedings were begun.”

The case now before this Court is an excellent example of the necessity of rewarding those who have rendered valuable, constructive services in the administration of the estate. Here Appellant actually created a fund in excess of \$4,000,000.00 by the sale of these

assets from which all creditors and stockholders have been paid in full, the Trustee and attorneys have been paid in full, and for which everyone has been paid except the Appellant who created this fund. It is submitted that as a matter of public policy this is the type of services which should be encouraged in these reorganization proceedings, and the type of services for which compensation should be awarded when the services are accepted with such great benefit to the estate. Such a rule of compensation in accord with the benefit received by the estate is completely fair to the creditors and stockholders, and still encourages individuals to render valuable, beneficial services in these reorganization proceedings. Without Appellant's services in this matter the R.F.C. would have foreclosed, and the creditors and stockholders would have received nothing. The value of Appellant's services to the estate and to the stockholders and creditors in this matter is therefore most substantial.

It is apparent that under the applicable statutes and cases Appellant is entitled to reasonable compensation in this matter in accord with the benefit received by the bankrupt estate.

IV.

THE TRUSTEE WAS OBLIGATED TO PAY FOR THE SERVICES OF APPELLANT BOTH UNDER THE LAW OF IMPLIED IN FACT CONTRACTS AND THE LAW OF QUASI CONTRACTS.

The lower Court has found that there was no obligation to pay for the services of Appellant which were

rendered at the request of the Trustee, freely accepted, and of great benefit to the estate. Appellant contends that the circumstances of this case do create an obligation to pay for these services both under the law of implied in fact contract and the law of quasi contract. A statement of the definition of these two types of recovery and of the difference between them is important to the understanding of Appellant's position in this matter.

Williston on Contracts, Volume 1, Page 6, Section 3:

“Contracts are express when their terms are stated by the parties. Contracts are often said to be implied when their terms are not so stated. The distinction is not one of legal effect, but in the way in which mutual assent is manifested. The expression ‘implied contract’ has given rise to great confusion in the law. Until recently the divisions of the law customarily made coincided with the forms of action known to the common law. Consequently, all rights enforced by the contractual action of assumpsit, covenant, and debt were regarded as based on contract. *Some of these rights, however were created not by any promise or mutual assent of the parties, but were imposed by law on the defendant, irrespective of, and sometimes in violation of, his intention.* (Emphasis added.) Such obligations were called implied contracts. A better name is that now generally in use of ‘quasi contracts.’ This name is better since it makes clear that the obligations in question are not true contracts, and also because it avoids confusion with another class of obligations which have also been called implied contracts. This latter class consists of obligations

arising from mutual agreements and intent to promise but where the agreement and promise have not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact."

The distinction between quasi contract and implied in fact contract is also set forth in *Woodward, Law of Quasi Contract* at page 6, Sec. 4, as follows:

"*Quasi contracts distinguished from contracts.*—Only within the last generation have quasi contractual obligations been commonly so called. They were formerly regarded as a species of contract, and *to distinguish them from express contracts and contracts implied in fact* (emphasis added), i.e. contracts in which a promise is inferred from conduct, were called contracts implied in law. Since, like contracts proper, they were enforced by means of the action of assumpsit, it is not surprising that in a period when more importance was attached to the forms of legal remedies than to the nature of substantive rights, the essential dissimilarity of the two obligations was not observed. The persistent failure to recognize it, however, has resulted in confusion and error, and in many cases has wrought serious injustice. It cannot be too strongly emphasized, therefore, that *quasi contracts are in no sense genuine contracts*. The contractor's obligation is one that he has voluntarily assumed. *He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is*

an implication of the promisor's conduct. But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable.” (Emphasis added.)

It is apparent that an implied in fact contract is a true contract the evidence of which is supplied by the conduct of the parties, whereas a quasi contract is an obligation imposed by the law without regard to the understanding or assent of the parties, and even in the face of a refusal to pay, as the result of the receipt of a benefit by one party which it would be inequitable for him to retain without compensation.

The law of quasi contract is derived from the common law, and has general application throughout the law. The law of quasi contract is equally applicable in the Federal Court. The distinction between implied in fact contracts and quasi contracts, and the importance of this distinction, has been pointed out in a recent decision of this Circuit Court in the case of *Hill v. Waxburg*, 237 Fed. (2d) 936, 939 (9th Circuit, October 26, 1956) where the Court states as follows:

“An ‘implied in fact’ contract is essentially based on the intention of the parties. It arises where the Court finds from the surrounding facts and circumstances that the parties intended to make a contract but failed to articulate their promises and the Court merely implies what it feels the parties really intended. It would follow then that

the general contract theory of compensatory damages should be applied. Thus, if the Court can in fact imply a contract for services, the compensation therefore is measured by the going contract rate.

“An ‘implied in law’ contract, on the other hand, is a fiction of the law which is based on the maxim that one who is unjustly enriched at the expense of another is required to make restitution to the other. The intention of the parties have little or no influence on the determination of the proper measure of damages. (Emphasis added.) In the absence of fraud or other tortious conduct on the part of the person enriched, restitution is properly limited to the value of the benefit which was acquired.

“The distinction is based on sound reason, too, for where a contract is all but articulated, the expectation of the parties are very nearly mutually understood, and the Court has merely to protect those expectations as men in the ordinary course of business affairs would expect them to be protected, whereas in a situation where one has acquired benefits, without fraud and in a non tortious manner, with expectations so totally lacking in such mutuality that no contract in fact can be implied, the party benefited should not be required to reimburse the other party on the basis of such parties’ losses and expenditures, but rather on a basis limited to the benefits which the benefited party has actually acquired.”

Appellant contends that he is entitled to an award of compensation in this matter under both the law of quasi contract to prevent unjust enrichment and by

the formation of a true implied in fact contract from the conduct of the parties.

A. There Was an Implied in Fact Contract Between Appellant and the Trustee Arising Out of Their Conduct Irrespective of the Statements of the Trustee.

First, from the point of view of implied in fact contract, the lower Court found and the facts disclose that the services of Appellant were rendered with the full knowledge, cooperation and encouragement of the Trustee, and at the request of the Trustee's attorney; were freely accepted by the Trustee, and were of benefit to the estate. These facts create a true implied in fact contract, the existence and terms of which are manifested by the conduct of the parties. When services are rendered at the request of one of the parties, the acceptance of the services is sufficient conduct to establish a true implied in fact contract. The mutual assent and intent to contract is implied from the conduct of the parties in rendering and accepting the services, rather than their words as in express contracts.

However, the lower Court expressed some reluctance to find a true implied in fact contract from the conduct of the Trustee in accepting these services in this case in view of the evidence of statements by the Trustee that Appellant should obtain his compensation from the Buyer. The Court felt that the evidence of these statements prevented the formation of a true implied in fact contract because of lack of mutual assent. However, the Trustee's statements are in

reality only evidence in conflict with the conduct of the Trustee in accepting these services. Appellant contends that the conduct of the Trustee in accepting the benefit of these services under the facts of this case speak more loudly, and are stronger evidence of his true intent, than any words he may have used. These services were offered by the Appellant with the expectation of compensation, and the Trustee had a full opportunity to reject these services if he did not desire to pay for them. The acceptance of these services and the exercise of dominion over them under these circumstances creates a true implied in fact contract. (See Restatement of Contracts, Section 72, Acceptance By Silence or Exercise of Dominion.)

We have here a conflict in the evidence between the conduct of the Trustee and his words, and Appellant feels that this conflict must be resolved by finding that the conduct of the Trustee in accepting these services created a true implied in fact contract. If "A" picks up an apple from "B's" fruit stand on which there is a sign "5c each", and starts eating it, he has either made a contract to pay for it by his conduct or tortiously converted the property of another. If "A" under the same circumstances picks up the apple, but while he is eating it continually shouts at the top of his voice that he does not intend to pay for it, "A" has not prevented the creation of a contract by his spoken words nor has he eliminated the effect of his unlawful dominion over the property of another. The contract is made, and an obligation to pay for the apple arises from "A's" conduct in

eating the apple, and the contract comes into existence by his conduct irrespective of his words and "B" may waive the tort and sue in contract. The same type of conduct in this case, in spite of the Trustee's statement, has created a true implied in fact contract. As is stated in the Restatement of Contracts, Section 72 (1), the acceptance of the benefit with a reasonable opportunity to reject them will create a true implied in fact contract.

Appellant's services were rendered with the expectation of compensation. This expectation of compensation was reasonably predicated upon the fact that under precisely the same circumstances Appellant was paid compensation for similar services rendered to the Trustee in the Nielson transaction. The Trustee freely accepted these services knowing that the buyer refused to pay for them, and that no arrangement for compensation by the buyer had been made since he foreclosed Appellant from participating in the final negotiations. The only logical inference that can be drawn from this conduct by the Trustee is that he intended to pay for these services himself. His conduct could not mean anything else. He and/or his agent had requested services that had to be paid for, and no one else would pay. The acceptance of these services under these circumstances created a contract to pay for them manifested by the conduct of the parties.

This legal principle of assumption of obligation by the acceptance of benefit has been codified in the State of California:

California Civil Code Section 1589:

“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”

In the recent case of *Desney v. Wilder*, 46 Cal. (2d) 715, 299 Pac. (2d) 257 (June, 1956) the Supreme Court of California set forth a clear and lengthy analysis of the law of implied in fact and implied in law or quasi contract and recognizes both doctrines as being fully applicable in California. The decision further substantiates that there are genuine implied in fact contracts of both the meeting-of-the-mind and the no-meeting-of-the-mind variety, and the Court quotes from an article by Mr. Williston in 14 Illinois Law Review, 85, 90 as follows:

“The parties may be bound by the terms of an offer even though the offeree expressly indicated dissent, *provided his action could only lawfully mean assent.* (Emphasis added.) A buyer who goes into a shop and asks and is given (told) the price of an article, cannot take it and say ‘I decline to pay the price you ask, but will take it at its fair value.’ He will be liable, if the seller elects to hold him so liable, not simply as a converter for the fair value of the property, but as a buyer for the stated price.” (Citing cases.)

B. The Law of Quasi Contract Imposes by Law an Obligation to Pay for Services Which Are Freely Accepted and Beneficial Irrespective of the Intent or Statement of the Parties.

In the absence of a true implied in fact contract, and in the face of the Trustee's statement that he would not pay Appellant, there is still an obligation imposed by law upon the Trustee to pay reasonable compensation for Appellant's services in this matter which were accepted by the Trustee and beneficial to the estate. The Court in its Memorandum and Order of January 26, 1955, stated that it could not torture an agreement out of the facts in this case; and that although equity could enforce an express or implied contract, equity could not make the contract where there was in fact no understanding upon which it could be founded. (Tr. 54 and 55.) Attention is invited to the law of quasi contract wherein a quasi contractual obligation is imposed by law and equity irrespective of the understanding or mutual assent of the parties, and even in the face of an expressed refusal to pay, when in equity and justice there is an obligation to pay. In this exact situation where there has been an acceptance of the benefit of services under ambiguous circumstances, or where there has been no agreement for compensation, the Courts have for many years implied by law an obligation to pay for the services thus accepted, and this obligation is imposed by the law without regard to the existence of a true contract.

The law of quasi contract raises by law an obligation to pay the reasonable value of services rendered

respective of the intentions or agreements of the parties.

27 *Cal. Jur.* p. 198, Section 2:

“A contract implied by law, on the other hand, is not a contract at all, but a quasi or constructive contract, an obligation imposed by law regardless of any agreement. (Emphasis added.)

Actions on quantum meruit to recover the reasonable value of services rendered are based on such a quasi contractual obligation, the fundamental principle involved being that no person can conscientiously retain the benefit of another's labor without paying a reasonable compensation therefor.”

27 *Cal. Jur.* p. 199, Section 4:

“As a general rule, where one performs valuable services for another, the law raises an implied promise to pay a reasonable compensation therefor, unless they are performed under circumstances which show that they were to be gratuitous.”

This obligation imposed by the law will prevail against the intent of defendant not to pay, or statements that he will not pay for the services.

5 *Cal. Jur.* (2d) 528, Section 4:

“The implied contract may arise from the conduct of the parties, as where goods are sold and delivered by one person to another at the latter's request. Although there may be no agreement as to payment, the law will raise a contract implied in fact to pay the reasonable value of such goods. The contract so implied will prevail against the

actual intent of a defendant not to pay.” (Emphasis added.)

7 *Corpus Juris Secundum*, p. 111, Section 4:

“While originally the action of *assumpsit* was limited in its scope to true contracts, a true contract, in the sense that the parties have entered into an actual agreement, is not now considered essential, as the courts have extended the remedy to include cases where the obligation arises not out of contract, but from the application of equitable principles to the circumstances. *In such a case, the obligation and the fictitious promise out of which it, in theory, springs are imposed by law without reference to the intention of the parties and often against their expressed intentions, for the purpose of allowing the remedy by action of assumpsit.*” (Emphasis added.)

The law of quasi contract is more fully explained in the following quotation:

12 *Am. Jur.* pp. 502-503, Section 6:

“Both express contracts and contracts implied in fact are based on consent. Evidently, in view of the fact that these are the contracts which are usually before the Courts, it has been said that there is no contract without the consent of the parties. Clearly, such an observation must have been made without regard to the existence of certain legal duties which, though of a contractual nature, are not based on consent. These are sometimes spoken of as contracts implied in law, but are more properly called quasi contracts or constructive contracts. They are contracts in the sense that they are remediable by the contractual

remedy of assumpsit. In the case of such contracts, the promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. *The intention of the parties in such case is entirely disregarded while in the case of express contracts and contracts implied in fact the intention is of the essence of the transaction. As has been well said, in the case of actual contracts the agreement defines the duty, while in the case of quasi contracts the duty defines the contract. A quasi contract has no reference to the intention or expression of the parties.* (Emphasis added.) The obligation is imposed despite, and frequently in frustration of their intention. For a quasi contract neither promise nor privity, real or imagined, is necessary. In quasi contracts the obligation arises, not from consent of the parties, as in the case of contracts express or implied in fact, but from the law of natural immutable justice and equity. The act, or acts from which the law implies the contract must, however, be voluntary. Where a case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation."

The law of quasi contract is based upon equitable principles.

12 *Cal. Jur.* (2d) p. 191:

"It is apparent from these examples that such an obligation, although contractual in the sense that it is remediable in assumpsit, lacks the element

of consent, which is an essential ingredient of an actual contract. The law imposes the obligation irrespective of the intention of the parties. *In other words, a quasi contractual obligation arises without reference to assent. It is elementary that such an implied contract has its foundation in the doctrine of unjust enrichment.* (Emphasis added.) It has been stated otherwise that the only promise implied by law is a promise based upon the equitable doctrine that the promisor, having received the benefit, should pay its reasonable value. The action in such cases is in form *ex-contractu*; but the alleged contract is purely fictitious, the right to recover does not depend on any principle of privity of contract, and no privity is necessary. Although the action is at law, the right to recover is governed by principles of equity.”

5 *Cal. Jur.* (2d) p. 526:

“The extensive use of action (*Assumpsit*) to recover on quasi contracts, where in fact no contract exists other than that created by the fiction of the law to prevent unjust enrichment is based on equitable principles, and both the plaintiff’s recovery and the defenses against his claim are governed by equitable considerations.”

It is apparent from these citations that in the absence of an agreement or understanding between the parties, and even in the face of expressed intention of one of the parties not to pay, the law does impose an obligation in quasi contract to pay for services rendered at the request of one party accepted by him, and of benefit to him. This obligation is imposed by

the law to do justice and equity between the parties and to avoid unjust enrichment and is not affected by the absence of agreement or understanding between the parties.

There are obviously a great number of cases dealing with the law of quasi contracts and its application. It is not necessary to review all of these cases. The general rule of these cases is shown by the text citations hereinabove set forth.

It should be noted that the law of quasi contract is a rule of the common law based on the common law notions of assumpsit and indebittatus assumpsit. The common law is of course applicable in both State and Federal Courts. (*Hill v. Waxburg*, supra, 237 Fed. 2d) 936.)

The following propositions illustrate the application of the law of quasi contract to the facts of this case, and the following propositions are supported by the cases cited.

1. *In the complete absence of any understanding or intent to contract, and even in the face of an express refusal to pay, there is a quasi contractual obligation to pay for services which have been accepted and acquiesced in.*

Vangel v. Vangel, 45 AC 828, 291 Pac. (2d) 25.

This case involves a dissolution of a partnership and defendants claim for the reasonable value of services rendered to the partnership after the dissolution. There was no evidence of any request for these serv-

ices, or any evidence of any agreement to pay for them. In fact, the lower Court had found that defendant was a volunteer who had rendered services against the wishes and directions of the plaintiff. However, the Supreme Court held in this case that the mere acceptance of the services, without any request or without any agreement or understanding in regard to compensation, was sufficient to support a recovery by defendant for his services, and that it would be inequitable to deny defendant compensation for his services when his brother acquiesced in them. This is a clear quasi contractual recovery awarding compensation for services rendered and accepted without any evidence of request and without any evidence of mutual consent or understanding in regard to payment.

To the same effect is the case of *Philpott v. Superior Court*, 1 Cal. (2d) 512, 36 Pac. (2d) 635, which contains a lengthy and comprehensive treatment of the development of the law of quasi contract as well as an analysis of its application. This discussion makes it clear that the law of quasi contract is a legal fiction based upon equitable principles of justice and fairness. Because it is a legal fiction imposed irrespective of the intent of the parties, even an expressed refusal to pay cannot affect this obligation created by the law. The Court in this case stated as follows:

“This doctrine is also expressly endorsed in *Halidie v. Enginger*, supra, 175 Cal. at page 508 166 P. (2d) 1: ‘In some instances the action on implied contracts does not in truth rest upon con-

tracts at all. In others the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong. *Thus, where A delivers goods to B at B's request, even though B never meant to pay for them, the law erects the legal fiction that he promised to pay, (emphasis added) and he will not be heard to deny it in the action for quantum valebatur in assumpsit'.*"

These cases illustrate that evidence of statements by the Trustee that he would not pay a commission to Appellant has absolutely no effect upon a quasi contractual recovery. The promise to pay is a legal fiction raised by the law in the interest of justice and equity from the acceptance of the benefits, and statements by the Trustee refusing to pay have no effect upon this law imposed obligation.

3. *Services rendered in procuring a purchaser for assets of the seller will give rise to a contractual obligation to pay for such services when accepted.*

Freeman v. Jergins, 125 Cal. App. (2d) 536, 271 Pac. (2d) 210.

In this case defendant accepted plaintiff's services in procuring a purchaser for certain stock belonging to defendant. There was no evidence of any agreement or understanding between the plaintiff and defendant in regard to these services or the payment for them. In fact, all evidence of any agreement or understanding between these parties has been stricken from the record because of the death of defendant Cotton. The

Court, found, however, that these services had been rendered by plaintiff with the expectation of compensation, that defendant accepted and had the benefit of plaintiff's services, and that the recipient thereby had an obligation to pay the reasonable value thereof. This case makes it clear that Appellant is entitled to a quasi contractual recovery of the reasonable value of his services in procuring the purchaser for the assets of this estate. This type of service in procuring a purchaser for assets is a proper basis for quasi contract where the services are accepted, and the acceptance of these services will give rise to this obligation even in the absence of any agreement or understanding between the parties.

C. *Where the recipient has intentionally or unintentionally misled plaintiff in inducing him to render services, plaintiff will be entitled to the reasonable value of his services in quasi contract.*

Lazzarevich v. Lazzarevich, 88 Cal. App. (2d) 708, 200 Pac. (2d) 49.

The Court in this case applied the law of quasi contract to support a recovery by plaintiff of the reasonable value of her services during an invalid marriage which she believed in good faith to be valid. This mistaken belief was caused by defendant's representations, and this mistaken belief induced plaintiff to render these services. The Court held that plaintiff was entitled to compensation for the services that had been rendered under this mistaken belief, and held that this quasi contractual recovery would be allowed

whether the misrepresentations were fraudulently or innocently made. (See also *Restatement of Restitution*, Section 40). These citations illustrate that the intentional or unintentional misleading of Appellant by the Trustee's conduct in the Nielson transaction, and the statements of Mr. Carr that he would be paid, are an additional ground for the application of quasi contractual recovery.

9. *Quasi contractual recovery is given in Reorganization proceedings under the Bankruptcy act to compensate petitioners who have rendered services which were accepted and of benefit to the Debtor estate.*

In re Irving-Augustin Building Corporation,
(supra), 100 Fed. (2d) 554.

This was an action for an allowance for services rendered to a bankrupt estate during reorganization proceedings under Chapter 10 of the Bankruptcy Act. The Court in that case states what Appellant feels is the correct rule in awarding allowances in these reorganization proceedings. The Court stated as follows:

"Benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured where no employment by the Court or Trustee exists."

"This conclusion is confirmed by a study of the rulings in the analogous fields of contract law. Liability for debts is traceable to contractual origin. Express or implied promises are prerequisite to debt liabilities. When A contracts with B for the latter's services, a case of express

agreement arises. The amount of compensation is fixed by the contract or the law inserts the measure of damages known as quantum meruit. *If no contract exists, and services are rendered liability arises only when the results and the benefits of the services are accepted by the other party in which case liability arises out of such acceptance of the fruits of the other's labor.* (Emphasis added.) In all such cases liability is measured not by the amount of time and energy expended by the laboring party, but by the value of such services to the beneficiary."

This bankruptcy case is clear authority for quasi contractual recovery in bankruptcy proceedings. To the same effect are the cases of *In re Buildings Development Co.*, 98 Fed. (2d) 844; and *In re Industrial Machine & Supply Co.* (supra), 112 Fed. Sup. 262, 264.

The case of *Berman v. Palmetto Apartment Corp.* (supra), 153 Fed. (2d) 192, which has already been discussed in this brief, is another case where the Court awarded compensation to a real estate agent for services rendered based upon benefit to the estate and in the interests of justice and equity and even in the absence of any contract or legal claim. The *Berman* case is also apparently a case of quasi contractual recovery.

V.

**RIOR AUTHORIZATION IS NOT REQUIRED IN BANKRUPTCY
PROCEEDINGS WHERE COMPENSATION IS BASED ON
BENEFIT TO THE ESTATE.**

It appears from the cases that reasonable compensation has often been allowed by the Court in bankruptcy proceedings for services rendered to the Debtor estate which are beneficial to the estate without prior authorization for these services having been obtained from the Court. In this situation the compensation has been in accord with the benefit received.

This is to be distinguished from the situation where claim is made against the estate based upon an express contract fixing a definite contract price, in which situation the Courts may require prior authorization for such an express contract in order to protect the estate from any excessive charge which may be fixed in the contract. However, that is not this case.

Here Appellant seeks compensation for services beneficial to the estate, and in accord with the benefit which was received by the estate. Here the measure of compensation is the value of the benefit to the estate. As the Court stated in the case of *In re Irving-Austin Building Corp.* (supra), 100 Fed. (2d) 574, "benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured, where no employment by the Court of Trustee exists." This rule of allowing compensation in accord with the benefit received by the estate when no prior authorization has been obtained,

allows the Court to reward those who have rendered services beneficial to the estate, and also protects the estate against charges for valueless services from which the estate derives no benefit.

This same principle of awarding compensation in accord with benefit to the estate even when there has been no contract for the services and when the services have not been previously authorized by the Court has been followed in the case of *Berman v. Palmett Apartment Corp.* (supra), 153 Fed. (2d) 192; in the case of *In re Building Development Co.* (supra), 9 Fed. (2d) 844; in the case of *In re Industrial Machine & Supply Co.* (supra), 112 Fed. Sup. 261, 264; and in the case of *In re Equitable Office Building Co.*, 8 Fed. Sup. 531. In fact, Appellant was awarded commission of 5% of the sales price of certain cutting contracts in this very proceeding in the Nielson transaction without any prior authorization for his services from the Court.

The services of real estate brokers and other agents are essential to the successful administration of a bankrupt estate. In order to obtain these essential services there must be some basis for compensation. In this case, as in many cases, it was impossible to determine prior to the rendition of the services which of the many real estate brokers encouraged by the Trustee to participate in the sale of the assets of the Debtor estate would be successful in obtaining a purchaser for the said assets, and it was therefore impos-

ble to obtain prior Court approval for the said services.

It is submitted that awarding compensation in accord with the contract price when the contract has received prior approval of the Court, and compensation accord with benefit to the estate pursuant to the rule in the above cited cases when there has been no prior approval for the services is a solution to this problem. Such a rule is fair to the Debtor estate which has received the benefit, and still provides a basis for compensating those whose services are essential to the successful administration of a bankrupt estate.

Without such a rule of compensation this estate and others would end in a foreclosure by secured creditors; whereas a rule of compensation for successful services accord with benefit to the estate as set forth in the cases above cited is a basis for obtaining participation of specialists in these bankruptcy proceedings.

CONCLUSION.

In conclusion it is submitted that as a matter of law, and/or equity, to prevent unjust enrichment and harsh result in this case, and as a matter of sound public policy, Appellant should be reasonably compensated for loyal, unofficious, meritorious and highly beneficial services rendered to the Debtor estate on

any one or all of the legal concepts set forth herein above in detail.

Dated, September 20, 1957.

Respectfully submitted,

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No. 15,583

United States Court of Appeals
For the Ninth Circuit

ALEX E. WILSON,

Appellant,

VS.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Co., debtor,

Appellee.

Appeal from the United States District Court for
the Northern District of California,
Northern Division.

APPELLANT'S OPENING BRIEF.

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No. 15,583

United States Court of Appeals For the Ninth Circuit

ALEX E. WILSON,

Appellant,

VS.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Co., debtor,

Appellee.

APPELLANT'S OPENING BRIEF.

Appeal from the United States District Court for
the Northern District of California,
Northern Division.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the District Court, Northern District of California, Northern Division, rendered in a reorganization proceeding in which the Court refused to award to Appellant reasonable compensation for services rendered to the Debtor corporation, Coastal Plywood & Timber Co., while said Debtor corporation was in the midst of proceedings for the reorganization of a corporation under Chapter 10 of the Bankruptcy Act (U.S.C. Title XI, ch. 10, Sections 501 to 676). Appellant petitioned for compensation under Sections 241-250 of

the Bankruptcy Act (11 U.S.C. Sections 641-650) providing for compensation and allowance for services rendered to the Debtor estate in reorganization proceedings.

This appeal is taken under Section 250 of the Bankruptcy Act (11 U.S.C. Section 650) after the denial of Appellant's claim, and also under the provision of Section 23 and Section 25 of the Bankruptcy Act (11 U.S.C. Section 47 and Section 48), which gives the United States Court of Appeals appellate jurisdiction from the several Courts of Bankruptcy in their respective jurisdictions.

STATEMENT OF THE CASE.

The Appellant, Mr. Alex E. Wilson, filed his Petition for Allowance of Real Estate Broker's Commission with the District Court petitioning the Court for reasonable compensation for services rendered to the Trustee, and to Coastal Plywood & Timber Co., the Debtor corporation, in the sale of the assets of the Debtor corporation. (Tr. 19-31.) It is his contention that these services were rendered at the request of the Trustee and his attorney, and that these services were of great benefit to the trust estate. His petition was based on Sections 241-250 of the National Bankruptcy Act (11 U.S.C. Sections 641-650) which authorize an allowance of reasonable compensation for services rendered in connection with the administration of an estate in a proceeding under Chapter 10 of the Bankruptcy Act.

The evidence on the hearing of this petition established that Coastal Plywood & Timber Co., was a corporation with extensive timber holdings in Northern California, and that it had petitioned for reorganization of its affairs under Chapter 10 of the Bankruptcy Act. Mr. Fred Stevenot was appointed as Trustee for the Debtor corporation, and Mr. Sterling Carr was appointed as one of the attorneys for the Trustee. Mr. Alex E. Wilson was and now is a duly licensed real estate broker specializing in the sale of timber holdings. (Tr. 132-133.)

In approximately July, 1952, Mr. Sterling Carr, one of the attorneys for the Trustee, asked Mr. Wilson if he would help to sell the assets of Coastal Plywood & Timber Co. (Tr. 135.) Mr. Wilson subsequently discussed the sale of these assets with Mr. Stevenot, the Trustee, and was authorized to proceed with the sale of certain timber cutting contracts referred to as the Ricard, the Brush and the Reynold contracts (Tr. 135-136), and was authorized to proceed with the sale of certain timber rights referred to as the Garcia Tract. (Tr. 140-141.)

Following these conversations Mr. Wilson expended a great deal of time, effort and money in attempting to find purchasers for these timber cutting contracts and for the timber rights in the Garcia Tract. (Tr. 137-141.) During this time Mr. Wilson was continually in contact with the Trustee, Mr. Stevenot, by personal visits in his office, by telephone, and by letter, keeping him advised of the status of his negotiations,

the people he had called on, and the people he hoped to interest in the purchase of these assets. (Tr. 142.)

Finally, in October, 1952, Mr. Wilson submitted to Coastal Plywood & Timber Co., an offer from Mr. Clarence Nielson for the purchase of the said timber cutting contracts for the sum of \$100,000.00. (Petitioner's Exhibit No. 1, Tr. 145-146.) This offer on behalf of Mr. Nielson in the sum of \$100,000.00 was accepted by the Trustee, submitted to the Court, and approved by the Court. (Tr. 3-18.) In connection with the approval of this sale of these cutting contracts the Court authorized the payment of a real estate broker's commission to Mr. Wilson in the sum of \$5,000.00, which is a normal real estate broker's commission of 5% on the total purchase price. The order of the Court, dated November 12, 1952, authorizing payment of the said real estate commission reads as follows:

"That Fred G. Stevenot, as Trustee herein, be, and he is hereby authorized to pay to A.W. Wilson, from said sum of 100,000.00 a commission on said transaction in the amount of \$5,000.00." (Tr. 18.)

This real estate commission was paid to Mr. Wilson by Coastal Plywood & Timber Co., check in the sum of \$5,000.00. The stub of this check was introduced as Petitioner's Exhibit No. 2 and reads as follows: "Commission—sale of cutting contracts—\$5,000.00". (Tr. 147.)

Following the sale of these timber cutting contracts to Clarence Nielson, Appellant continued in his efforts

to sell the Garcia Tract again expending a great deal of his time, effort and money and further continued in his practice of keeping Mr. Stevenot informed of his progress by personal visits, telephone and letter. Mr. Stevenot cooperated in every way by supplying Mr. Wilson with their timber cruisers and maps of the property (Tr. 270), and by giving him permission to show the property to prospective purchasers (Tr. 315) and by encouraging him in his efforts to sell this timber.

There is evidence that during the course of the negotiations for the sale of both the timber cutting contracts to Clarence Nielson and the Garcia Tract that the Trustee advised Appellant that he should obtain his compensation from the Buyer, and that the estate would not be responsible for his commission. Appellant admits that conversations were held with the Trustee wherein he was advised that he should look to the buyer for his commission, but Appellant testified that he stated to Trustee that this was impossible; that the seller always paid the real estate commission and not the buyer; and that Appellant didn't think it was possible to get his commission from the buyer, but that he would try to do so. There was never any agreement between Appellant and the Trustee that Appellant would look only to the buyer for his commission. At page 137 of the Transcript the following testimony appears:

“Q. What did you reply to that?

A. (Wilson.) Oh, I told Mr. Stevenot then, as I have told him many times, I said, ‘Well, that

is a very difficult thing to do; the buyer never pays, the seller always pays. I will try to do it, but I don't think I can'.

Q. Did you ever agree with Mr. Stevenot in regard to these contracts that we are now discussing that you would obtain your commission from the buyer.

A. No, never; it was always a question of him saying, to try and get it from the buyer and my saying, 'Mr. Stevenot, I can't get it from the buyer.' "

In spite of the conversations in regard to compensation the Trustee continued to urge Appellant to sell these assets. At page 273 of the Transcript the following testimony appears.

"Q. Did Mr. Stevenot ever tell you not to proceed if you could not get your brokerage from the buyer?

A. (Wilson.) No, quite the contrary; he urged me at all times to sell it, to continue to attempt to."

Appellant was paid his real estate broker's commission by the Trustee and the Debtor estate when he sold the timber cutting contracts to Clarence Nielson, and Appellant reasonably believed that he would be paid his commission by the Trustee in this matter if he was successful in selling these assets. The following testimony appears at page 272 of the transcript.

"A. (Wilson.) These conversations would take place in his office, Mr. Stevenot would tell me that he didn't want to pay me and he would say, 'Alec, I want you to get your commisison from the buyer.'

I would retaliate saying, 'Mr. Stevenot, you can't do that. In my 33 years as a broker I have never received a commission in my life from a buyer.' Mr. Stevenot would follow the same pattern in the next meeting, always stated he wanted me to get the commission from the buyer.

I asked him one day, I said, 'Mr. Stevenot, why do you take that particular position? You know that that is an impossible thing to do.'

He said, 'Well, I have a lot of fees to pay, I have got my own fee, and the attorney's, and I *just want* to go before the Court and ask for additional fees.'

Q. Mr. Wilson, during these discussions did you ever reach a definite understanding with Mr. Stevenot that you would not obtain your commission from Coastal?

A. Never a definite understanding, no, until the 22nd day of July and then I had a definite understanding.

Q. Did you ever have a definite understanding with him that you would obtain your commission from the buyer?

A. No, and I believed that he would pay me, because he followed the same pattern when I sold the Nielson deal, he always told me he wouldn't pay me, but he did pay me in the final analysis''

...

During the course of these negotiations Appellant, Alex E. Wilson, discussed the sale of these assets at various times with Mr. Sterling Carr, one of the attorneys for the Trustee. In the course of these conversations Appellant was assured by Mr. Carr that he would be paid for his services if he was successful in

selling these assets of Coastal Plywood, and Mr. Carr encouraged him to continue his efforts to sell these assets with the assurance that in the final analysis he would be paid by the Trustee for his services. At page 273 of the Transcript the following testimony appears:

(Wilson.) “. . . I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn’t pay me. Mr. Carr would urge me to continue. He said ‘Stevenot is quite a decent fellow, he won’t do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman *and he will pay you.*’ ” (Emphasis added.)

Again at pages 306-307 of the Transcript appears testimony of the Appellant under cross-examination concerning his conversations with the attorney for the Trustee:

“Q. Do you deny that the Trustee told you that if you worked on any proposal that you must act for the proponent, get your compensation from the proponent? (209.)

A. (Wilson.) Oh, Mr. Stevenot told me that all the time. He told me that with the Nielson deal, he never wanted to pay me—he said, ‘I don’t want to pay you, I don’t want to go before the Court.’ Mr. Carr, of course told me all the time, ‘You don’t have to pay any attention to that because after all he has no authority to pay you, he hasn’t any authority to give you a contract.’ He says, ‘We want to sell it and he wants to sell it, and I am going to see that the stockholders get dollar for dollar, and you will have to bring in—Alex, you will have to bring in an offer where the

stockholders are going to be protected, that is what I am mostly interested in, and everyone else, and then we can sell it.' But he said, 'If Mr. Stevenot takes this position that he won't pay you, then you must appeal to the Court. That is your refuge, and you will be treated honestly if you complete the deal and save this institution.' "

It is important to note that this testimony in regard to conversations with Mr. Carr stands uncontradicted in the record. Although Mr. Carr was one of the attorneys for the Trustee, he was not called to refute any of this testimony.

At various times Mr. Stevenot discussed with Appellant the terms of the sale which he wished to obtain for the assets of Coastal Plywood. These assets consisted of a sawmill, a log deck, rolling stock, 585,000,000 feet of timber and 36,000 acres of land. (Tr. 250.) Appellant suggested that he could probably obtain more money for the stockholders if he sold these assets piecemeal, but Mr. Stevenot insisted that all of these assets be sold in one sale. (Tr. 252.) Mr. Stevenot also insisted that the purchaser have sufficient cash to pay off all administration expense and the secured creditors, and suggested that an offer of \$4,000,000.00 with substantial people would probably be approved. (Tr. 253-254.)

Appellant continued in his efforts to find a purchaser for these assets (Tr. 255-260), and estimates that his actual time and expense in this regard were worth approximately \$20,000.00. (Tr. 261.) He continued to keep the trustee informed of his activities

and efforts by personal conversation, telephone calls and letters, and the Trustee was fully aware that Appellant was going to a great deal of expense and effort to obtain a purchaser for these assets. (Tr. 262-270.)

Finally, in April, 1953, Appellant began negotiations with the Sugarman interests through Mr. William Steinberg, an attorney in San Francisco. (Tr. 275-276.) The Sugarman interests insisted that before they could offer to purchase all of these assets of Coastal Plywood in one purchase as the Trustee required, it would be necessary to make some provision for the resale of these assets to other parties. (Tr. 278-279.) Appellant was able to arrange for these resales, and as a result on July 22, 1953, a written offer was delivered to the Trustee on behalf of the Sugarman interests for the purchase of the assets of Coastal Plywood. (Petitioner's Exhibit No. 3, Tr. 157-159.) The sale of these assets was eventually consummated to Sugarman Lumber Co., a corporation formed by the Sugarman interests to take over these assets. (Tr. 176-177.) The final gross sale price was \$4,352,000.00. (Tr. 386.) Appellant was excluded from the final negotiations between the Trustee and the Sugarman interests which resulted in this sale, and was never informed as to when the meetings between these parties were to take place. (Tr. 320, 407.) No provision was made in these negotiations between the Trustee and the Sugarman interests for the payment of any compensation to Appellant.

There is no question but that Appellant introduced the Sugarman interests to the Trustee, and that he

was the procuring cause of the sale. This was admitted by the Trustee from the witness stand, this testimony appearing at page 319 of the Transcript.

“Q. Mr. Hildebrand. But Mr. Wilson and Mr. Steinberg were the people who brought Sugarman to you, weren't they?

A. Mr. Stevenot. I am telling you, I don't deny that.”

The testimony discloses and the Trustee has stipulated, that this sale procured by Mr. Wilson was most beneficial to the Debtor estate. This stipulation appears at page 388 of the Transcript:

“Mr. Olson. I will stipulate, your Honor, that the second plan of reorganization which encompassed this sale was most beneficial to the estate.”

It is apparent from the testimony that this sale for which Appellant was responsible resulted in preventing the Debtor corporation from going into bankruptcy, and resulted in payment of the creditors in full, and in allowing substantial returns to the shareholders. It is equally apparent that if it had not been for the efforts of Appellant the property would have been foreclosed by Bank of America and R.F.C. and that the stockholders and other creditors would have received nothing. (Tr. 271.)

The lower Court was satisfied that Appellant had rendered services with the full knowledge, cooperation and encouragement of the Trustee and his attorney; that the services were accepted by the Trustee, and that the services were of real benefit to the bankrupt

estate. (Tr. 51—Memorandum Opinion.) However, the lower Court felt that Appellant was a volunteer, and that no obligation to pay for these services was created. In addition, the lower Court felt that the warning by the Trustee that the estate would not pay any broker's commission prevented a recovery by Appellant. Finally, the Court said "To torture an agreement to pay a commission out of these facts would be to create an implied contract where none in fact existed. Equity can enforce the contract, whether express or implied, but equity cannot make the contract for the parties where there was in fact no understanding upon which a contract could be founded." (Tr. 54-55.)

In response thereto Appellant's position in summary is that the acceptance by the Trustee of services rendered at his request, which were of great benefit to the bankrupt estate, created an obligation both at law and in equity to pay for these services, and that the Bankruptcy Court should have awarded reasonable compensation to Appellant for these beneficial services to the bankrupt estate under Sections 641-650 of the Bankruptcy Act (11 U.S.C. 241-250), under the applicable cases, and under the general law of implied in fact and quasi contract.

The evidence shows that Appellant always advised the Trustee that he could not obtain his compensation from the buyer, and that irrespective of these statements by the Trustee, that Appellant continued to look to the seller, the bankrupt estate, for his compensation. Furthermore, it is evident that although Appellant

produced the purchaser of the assets he was in effect foreclosed from negotiating a broker's commission from the buyer because the Trustee excluded Appellant from the final sale negotiations and thereby exercised unlawful dominion over the services of the Appellant, and if seller does not pay for the said services it would result in an unjust enrichment of the seller at the expense of Appellant. Appellant further contends that he was justified in so looking to seller for his compensation irrespective of these warnings by the Trustee in view of the statements to Appellant by Sterling Carr, attorney for the Trustee, that Appellant would be paid by the Trustee if he sold these assets, and in view of the fact that Appellant had been paid a real estate broker's commission by the Trustee in the Nielson transaction under identical circumstances and after exactly the same statements by the Trustee that the estate would not be responsible for his compensation. Accordingly, the Trustee and the Debtor estate should be estopped from denying Appellant reasonable compensation.

Appellant further contends that under the law of quasi contract the acceptance of the benefits of Appellant's services by the Trustee knowing that they had been rendered with the expectation of compensation created an obligation to pay for these services irrespective of the intent of the parties and even in the face of an expressed intention not to pay. Finally, it is evident that Appellant was not an officious volunteer because his services were rendered with the full knowledge, cooperation and encouragement of the Trustee

and his attorney, and Appellant, therefore, should not be denied compensation on that ground.

SPECIFICATION OF ERRORS.

The following is a list of the errors which Appellant intends to urge on appeal:

1. That the District Court erred in not finding that Appellant should be allowed a reasonable compensation for his services rendered to the Debtor in this reorganization proceeding at the special instance and request of Trustee, which services were accepted by the Trustee and admittedly of great benefit to the Debtor's estate.

2. That the District Court erred in not finding an implied in fact contract between Appellant and the Trustee of the Debtor's estate to pay Appellant a real estate broker's commission for his services in finding a buyer who purchased the assets of Debtor's estate for the gross sum of approximately Four Million Three Hundred Fifty-two Thousand Dollars (\$4,352,000.00) which services were accepted by the Trustee and admittedly of great benefit to the Debtor's estate.

3. That the District Court erred in not finding an implied in law or quasi contract between Appellant and the Trustee of Debtor as a matter of equity to pay the reasonable value of services rendered to Debtor's estate which were accepted

by the Trustee and admittedly of great benefit to Debtor's estate, irrespective of the intent of the Trustee.

4. That the District Court erred in not finding that the District Court sitting in bankruptcy by virtue of its inherent equitable powers and as a matter of sound public policy should award compensation to Appellant for valuable services rendered to, accepted by and of great benefit to Debtor's estate.

5. The District Court erred in not finding an express contract or implied in fact contract between Appellant and Debtor's estate based upon the assurances by Sterling Carr, attorney for the Trustee and agent of Debtor's estate, that Appellant would be paid a real estate broker's commission if he found a purchaser for the assets of Debtor's estate.

6. The District Court erred in not finding that the representations of Sterling Carr, attorney for the Trustee, who assured Appellant that he would be paid if he found a purchaser for the assets of Debtor's estate, were binding on Trustee and on Debtor's estate.

7. That District Court erred in refusing to compensate Appellant as a matter of equity for valuable services rendered to and accepted by Debtor estate, particularly since Appellant was encouraged to proceed and promised compensation therefor by an agent of the Trustee.

8. That District Court erred in finding that Appellant was to obtain his brokerage commission from Buyer for the said sale of the assets of the Debtor's estate, and that he was a volunteer.

9. That District Court erred in not finding that Appellant reasonably relied upon the Nielson transaction, which was a prior sale of similar assets of the same Debtor's estate, under similar circumstances, and for which Appellant was paid a brokerage commission in the sum of Five Thousand (\$5,000.00) Dollars by a check of the Debtor's estate; and in not finding that by virtue thereof Appellant proceeded to find a buyer of the remaining assets of Debtor's estate, in good conscience and in good faith, believing he would be similarly compensated.

10. The District Court erred in not estopping Trustee from refusing payment of a brokerage commission to Appellant, in view of the fact that Trustee paid Appellant under similar circumstances in the Nielson transaction, on which Appellant reasonably relied and rendered his services and incurred expense to find the buyer of the said assets and as a result thereof expected compensation therefor.

11. The Trial Court erred in not finding that Petitioner expended a great deal of effort and incurred a great deal of expense in producing a buyer of the Debtor's estate, and that in so doing he acted in good faith and reasonably believed, because of the Nielson transaction and the repre-

sentations of the Trustee and by his attorney and agent, that he would be compensated for his services.

12. That by reason of the law and evidence Appellant is entitled to a Judgment for a real estate broker's commission, or for reasonable compensation for services rendered to Debtor's estate which were of great benefit to Debtor's estate.

13. That the evidence does not support the Findings of Fact and Conclusions of Law made and entered by the District Court.

14. That the Order denying compensation made and entered by the District Court is not supported by the law.

ARGUMENT.

I.

THE CIRCUMSTANCES OF THIS CASE COMPEL THE COURT TO ALLOW COMPENSATION FOR THE SERVICES RENDERED BY APPELLANT AT THE REQUEST OF THE TRUSTEE, ACCEPTED BY THE TRUSTEE, AND OF GREAT BENEFIT TO THE BANKRUPT ESTATE.

The facts of this case show that the Trustee, and his attorney, Sterling Carr, requested that Appellant find a purchaser for the assets of the bankrupt corporation, and that they continually encouraged Appellant in his efforts to secure a purchaser for these assets. (Tr. 270, 273.) After a great deal of work and expense, Appellant procured Sugarman Lum-

ber Company as the purchaser of these assets. (Tr. 319.) The result of his services in procuring said purchaser were freely accepted by the Trustee, and it has been stipulated that these services were of great benefit to the bankrupt estate. (Tr. 297.) The said services were performed with the expectation of compensation, and were not intended to be gratuitous. After the purchaser had been procured by Appellant as requested, the evidence shows that the purchaser was taken by the Trustee without any thought or provision for compensating Appellant. (Tr. 320, 407.) There is no question but that these services rendered at the request of the Trustee and his agent, freely accepted by the Trustee, and of great benefit to the bankrupt estate created an obligation to pay for them which is recognized both at law and in equity and in proceedings under the Bankruptcy Act.

There can be no doubt that a Bankruptcy Court is a Court of equity and has broad equitable power (8 Corpus Juris (2d) 429, Section 21); that these equitable powers apply in the allowance of claims in bankruptcy proceedings in order to see that injustice or unfairness is not done in the administration of the bankrupt estate; (8 Corpus Juris (2d) 430-431, Section 22; *In re Avery*, 114 Fed. (2d) 768; *Interstate National Bank v. Luther*, 221 Fed. (2d) 382; *In re Commonwealth & Power Co.*, 141 Fed. (2d) 734); and that the Bankruptcy Court will look to the substance of the transaction rather than to the form toward the end that fraud will not prevail and that technical consideration will not prevent substantial

justice from being done. (*Pepper v. Litton*, 308 U.S. 294, 60 Sup. Ct. 238; 84 L. Ed. 281.) The rule which clearly is deducible from the authorities is that where a party designated by the act renders service in connection with the proceeding and plan the Court may not, without some special justification, refuse to allow any compensation whatever. (*In re Building Development Co.*, 98 Fed. (2d) 844, 846); that for successful administration of the statutes it is as important that committees who have earned something get some compensation as it is that they should not get too much. (*In re Prudence Co., Inc.*, 93 Fed. (2d) 455, 456) and that a very broad discretion is lodged in the chancellor in the allowance and fixing of fees which discretion must be exercised with judgment and with the double purpose of doing equities to those distressed and at the same time rewarding faithful and necessary service with reasonable compensation. (*In re Herz Inc.*, 81 Fed. (2d) 511, 512.)

Certainly these equitable powers of the Bankruptcy Court should be applied in this case to compensate the Appellant whose services have been of immense benefit to the bankrupt estate. It is submitted that people, such as Appellant, should be encouraged to try to help the bankrupt estate, rather than being discouraged by a refusal of any compensation when their services have been accepted and of benefit to the estate. When a man like Appellant has prevented the assets of this estate from being foreclosed by procuring a sale of those assets for a sum in excess of \$4,325,000.00 he should be reasonably compensated if it is at all possi-

ble for him to be compensated. It is apparent from the testimony that if it had not been for the services of Appellant in obtaining a purchaser for the assets of this estate we might well conclude that the Bank of America and R.F.C. would have foreclosed for the amount due, and the stockholders and creditors would have received nothing. (Tr. 403.) As a result of Appellant's efforts a sum in excess of \$4,325,000.00 was received on the sale of these assets, and this sum will enable the creditors and stockholders to be paid in full. In fact, everyone including the Trustee has been paid except Appellant who services made all of these other payments possible.

While the lower Court recognized that these services had been rendered with full knowledge, cooperation and encouragement of the Trustee and his attorney, were accepted by the Trustee, and were of great benefit to the bankrupt estate, it felt that conversations between the Trustee and Appellant during the course of their negotiations wherein the Trustee advised Appellant that he should obtain his compensation from his buyer prevented Appellant's recovery or compensation in this matter. However, it is clear that Appellant never agreed that he would obtain his compensation from the buyer. Appellant always protested that he did not think it possible to obtain his compensation from the buyer, and that the seller always paid the commission in a real estate transaction. Appellant always believed that in the final analysis he would be paid by the Trustee if he could not obtain his compensation from the buyer. Ap-

pellant was certainly justified in this belief. The Trustee had made identical statements to him in regard to the Nielson transaction. However, when the buyer would not pay his commission, a commission of 5% of the sale price was paid by the bankrupt estate. Appellant also discussed these conversations with Sterling Carr, attorney for the Trustee, and was advised that in spite of the said statements by the Trustee he would be paid if he sold these assets.

A. The Nielson Transaction.

Appellant was requested by the Trustee and his attorney to obtain a purchaser for certain cutting contracts, but was warned by the Trustee that he should obtain his compensation from the buyer. The situation was identical with the transaction now before this Court. Appellant told the Trustee that he did not believe that he could obtain any compensation from the buyer and that it would be very unusual if he could, but that he would try. Appellant secured Clarence Nielson as the purchaser of these cutting contracts. As Appellant had anticipated, the buyer refused to pay any compensation to Appellant, stating the buyer never paid the commission, and that the commission should be paid by the seller as was the usual situation. There is evidence of a conference between the Trustee and Clarence Nielson wherein the Trustee attempted to get Mr. Nielson to pay the commission, or to increase his offer so that the estate would net \$100,000.00 after the payment of a commission to Appellant. Mr. Nielson refused to do either, and refused to pay more than the sum of \$100,000.00

for these cutting contracts. In the face of this refusal by Mr. Nielson to pay a commission, the Trustee, knowing that he must pay the broker's commission if he intended to complete this sale to the purchaser procured by Appellant, agreed to pay the commission of Appellant. The Trustee petitioned the Court for the approval of the sale, and for the payment of a commission of \$5,000.00 to Appellant. No prior authorization for Appellant's services had been obtained from the Court. There was no contention made in the Nielson transaction that Appellant was a volunteer. The payment of this \$5,000.00 commission was approved by the Court and was paid by check of Coastal Plywood & Timber Co., the Debtor corporation, to Appellant.

The conduct of the Trustee in paying a commission to Appellant on the sale of these cutting contracts in the Nielson transaction, in spite of warnings that Appellant should obtain his compensation from the buyer, certainly confirmed Appellant in his belief in this case that if he procured a purchaser who refused to pay the commission the Trustee would pay him before he accepted the benefit of his services. In accord with this belief that he would be paid Appellant proceeded with the sale of the balance of the assets of Debtor which are the subject of this proceeding. As Appellant testified, the Trustee paid him before under identical circumstances, and he thought that he would pay him this time. This feeling was strengthened by the statements of Sterling Carr, the attorney for the Trustee, that if Appellant sold these assets,

he would be paid. It seemed apparent to Appellant in view of the assurances of Sterling Carr and the conduct of the Trustee in the Nielson transaction that, if Appellant was not successful in obtaining his compensation from buyer, then, of course, the Trustee in the final analysis would pay his commission if he wished to accept the benefit of the purchaser produced by Appellant, and if he wished to complete the sale to such purchaser. It was in this belief that he would be paid for his services that Appellant continued his search for a purchaser of these assets and completed this sale.

B. Statements by Sterling Carr That Appellant Would Be Paid.

According to the undisputed evidence in this case, Mr. Sterling Carr, the attorney for the Trustee, on various occasions and over a period of time, encouraged Appellant to find a buyer for the assets of the bankrupt estate, and said attorney told Appellant he would be paid for his services. Mr. Carr was not called by the Trustee to refute any of this evidence in regard to his conversations with Appellant, and the evidence of these conversations is undisputed in the record. These statements were obviously made in an effort to keep Appellant active in his search for a purchaser of these assets. The statements of this attorney for the Trustee on one of these occasions appears at page 273 of the Transcript.

“(Wilson.) I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn't pay me. Mr.

Carr would urge me to continue. He said, 'Stevenot is quite a decent fellow, he won't do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman *and he will pay you'*''.

Here is the uncontradicted and unequivocal statement by the attorney and agent of the Trustee to Appellant that he would be paid for his services. This statement alone, without any of the other equitable circumstances of this case, would compel the payment of compensation to Appellant in this matter.

Again at pages 287-288 of the Transcript the following uncontradicted statement by Mr. Sterling Carr appears:

“(Wilson.) Mr. Carr said, ‘I was never so shocked in all my life, I can’t believe it, I can’t believe that this is true’. He said, ‘Alec, you go along just exactly the way you are going, don’t say anything about it, because if Mr. Stevenot is going to treat you that way after you have raised all this money and sold this property, then the only thing you can do is seek refuge with the court, because, after all, Mr. Stevenot hasn’t got any legal right to give you a contract. Mr. Stevenot hasn’t any legal right to set your fee, and you go right along, because you have been honest in this thing and you have worked hard and we needed this money so badly, and when the deal is closed, if he still doesn’t pay you and you sue for it you can feel perfectly safe that the Courts of this state will treat you justly’”.

Appellant has now appealed to the equity and justice of this Court for compensation for these services which the agent of the Trustee unequivocally stated would be paid. In all equity and justice, under the circumstances of this case, and to prevent an unjust enrichment at the expense of Appellant, he should be paid the reasonable value of the said services. It is apparent that Appellant was misled throughout this transaction by the conduct of the Trustee and the statement by his agent that he would be paid for his services. Appellant performed these services in the justifiable belief and with the reasonable expectation that he would be paid, and he should be paid in accord with the benefit received by this estate.

With reference to the opinion of the lower Court that Appellant was a volunteer, attention is invited to the fact that compensation to a volunteer is usually denied only if his acts were officious. In view of the aforesaid facts demonstrating full knowledge, co-operation, encouragement and acceptance of Appellant's services by the Trustee of the Debtor estate, Appellant cannot be accused of officious conduct. Accordingly, reasonable compensation should not be denied on that ground.

C. The Trustee Prevented Any Possibility of Appellant Being Paid by the Buyer.

The evidence in this case is also clear that the Trustee himself conducted the final negotiations for the sale of these assets directly with the Sugarman Lumber Company, the purchaser procured by Appellant,

and the Trustee excluded Appellant from these negotiations. (Tr. 320, 407.) This conduct of the Trustee prevented any possibility that Appellant might have had of being paid by the buyer, or of protecting himself in obtaining compensation from one of the parties to the transaction. It is unusual for a broker to obtain his compensation from the buyer; it is impossible to obtain compensation from the buyer; when the Trustee takes his buyer from him, deals directly with the buyer himself, and excludes the broker from the negotiations. This conduct by the Trustee in effect is a tortious conversion of Appellant's services, and constitutes unlawful dominion by the Trustee over the services furnished by Appellant.

It seems inconceivable that the Trustee under these circumstances should attempt to rely on statements he had made many months before to Appellant that he should obtain his compensation from the buyer when, by his own conduct, he prevented Appellant from participating in the final negotiations for the sale, and made it impossible for Appellant even to attempt to get his compensation from the buyer. In the Nielson transaction, which had been conducted under similar warning, Appellant participated in the negotiations and was able to protect himself in the payment of his commission. Now the Nielson transaction had occurred again. The buyer refused to pay any commission or compensation because that was not the obligation of the buyer.

The Trustee was fully aware of the fact that the Sugarman interests refused to pay the commission,

and the Trustee knew that the exclusion of the broker from these negotiations would certainly prevent and foreclose any possibility the broker might have of being paid by the purchasers. (Tr. 159, 320.) With full knowledge of these facts, and being perfectly free to accept or reject the services of Appellant, the Trustee accepted the purchaser and the benefit of these services. It is submitted that when the Trustee accepts the benefit of the said services by Appellant under these circumstances the law will in good conscience and equity raise an obligation to pay for these services. No one compelled the Trustee to accept the benefit of Appellant's work. Of his own free will the Trustee accepted the benefit of these services rendered at his request, knowing that no provision had been made for the payment of Appellant, and knowing that the buyer had refused to pay any commission. Under these circumstances the Trustee, as a matter of law, accepts the obligation to pay for these services when he accepts their benefits. This is the law of quasi contract, and this is the law applicable to this case. Any statement by the Trustee in regard to the manner of paying Appellant must give way to the conduct of the Trustee in taking Appellant's purchaser and preventing any other manner of payment for the reasonable value of these services requested by the Trustee and freely accepted by the Trustee when they had been rendered.

In summary, the facts of this case show a course of conduct by the Trustee and statements by his agent which led the Appellant on in search for a purchaser

of these assets in the justifiable belief that he would be paid for his work if it was successful. The Trustee had paid his commission for services previously rendered under identical circumstances in the Nielson transaction, and the attorney for the Trustee told him that he would be paid for his services in this sale. When Appellant did procure a purchaser for these assets, the Trustee commenced direct negotiations with this purchaser, and excluded Appellant therefrom thereby preventing any possibility of Appellant obtaining his compensation from any source other than the Trustee.

Appellant contends that upon the facts of this case he is entitled as a matter of justice and equity to reasonable compensation for services rendered in the administration of this estate. The Bankrupt Act, Sections 241-242, authorize the payment of compensation to Appellant for his services in this matter, and the applicable cases authorize the allowance of compensation to a real estate broker under almost identical circumstances. Appellant also contends that both under the law of implied in fact contracts resulting from the conduct of the Trustee, and under the law of quasi contract imposed by the law irrespective of the intent of the parties there is an obligation to pay reasonable compensation for these beneficial services rendered by the Appellant and accepted by the Trustee in this case.

II.

THE ALLOWANCE OF REASONABLE COMPENSATION TO REAL ESTATE BROKERS FOR SERVICES RENDERED IN CONNECTION WITH THE ADMINISTRATION OF AN ESTATE IN REORGANIZATION PROCEEDINGS IS AUTHORIZED BY SECTIONS 241 AND 242 OF THE BANKRUPTCY ACT.

The Bankruptcy Act, Sections 241-250 (11 U.S.C. Sections 641-650) provides for the allowance of reasonable compensation for services rendered in connection with the administration of an estate in reorganization proceedings. Section 242 of the Bankruptcy Act provides as follows:

“Sec. 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.”

These Code sections are clear authority for the allowance of the claim of Appellant in this action for his services rendered at the request of the Trustee and his agent, and accepted by the Trustee when a

purchaser was procured by Appellant for the assets of this estate. This sale was admittedly of great benefit to the Bankrupt estate, and it is submitted that Appellant should now be paid reasonable compensation for his services in this reorganization proceeding.

III.

THE ALLOWANCE OF REASONABLE COMPENSATION TO A REAL ESTATE BROKER FOR HIS SERVICES IN THE ADMINISTRATION OF AN ESTATE IN REORGANIZATION PROCEEDINGS WAS AUTHORIZED IN THE BERMAN CASE UNDER ALMOST IDENTICAL CIRCUMSTANCES AND IS AUTHORIZED BY OTHER BANKRUPTCY CASES.

In the case of *Berman v. Palmetto Apartments Corporation*, 153 Fed. (2d) 192 (1946; C.C.A. 6 Michigan) the Circuit Court reversed a District Court which had refused to allow compensation to a real estate broker who had rendered services in a reorganization proceedings to the bankrupt estate in the sale of its assets.

The factual situation in the *Berman* case and in this case are almost identical, and the legal question presented in this matter, and the legal questions before the Court in the *Berman* case, are equally similar.

In the *Berman* case, as in this case, the Debtor corporation was in the midst of reorganization proceedings under Chapter 10 of the Bankruptcy Act, and a Trustee had been appointed. Berman was a licensed real estate broker, and had many conversations with the Trustee in regard to the sale of an

apartment house which was the principal asset of the Debtor corporation. Berman had no written contract with the Trustee, and had not obtained any prior Court authorization for his services. Berman finally obtained an offer from a Mae Hess, a nominee of the final purchaser, which was submitted to the Trustee and accepted. This sale was submitted to the Court for approval. While this sale was under advisement by the Court, the true purchaser submitted an increased offer, which offer was finally confirmed by the Court without mention of a real estate commission to Berman. Berman filed a petition for an allowance of a real estate commission contending, among other things, that he was entitled to compensation for services rendered which benefited the Trustee and the trust estate. The lower Court denied his petition, and the Circuit Court reversed using the following language:

“The District Court denied his petition altogether. The Court filed an opinion which contained a finding that there was no valid existing contract between Appellant and the Trustee for the payment of a commission to Appellant. Conceivably this may be true because the contract never had the sanction or approval of the Court, but we are not limited to a consideration of the strict legal right of the parties.” *O’Hara v. Oakland County*, 6 Cir., 136 Fed. (2d) 142.

“Appellant’s case cuts deeper than this. The District Court was sitting in Bankruptcy and under the Bankruptcy Act had equitable jurisdiction. It is generally held that a selling agent is entitled to compensation if his agency is the procuring

cause of the sale, and when his communication with the purchaser have been the means of bringing the purchaser and his principal together, his right to compensation is complete.” (Citing many cases.)

“It is unquestionably true that Appellant, on behalf of the Trustees, was actively instrumental in procuring the first offer of the purchaser. It is crystal clear that he was the ‘procuring and inducing cause’ of the sale. The withdrawal by Mae Hess of the original offer did not nullify his claim for she, as pointed out, was no more than a dummy for the purchasers. Her withdrawal and the second offer of the purchasers amounted simply to a raised bid by the purchasers. The original offer, the withdrawal of it and the subsequent offer, confirmed by the Court, were phases of a continuing transaction which resulted in the sale and in which Appellant certainly had equitable if not legal rights, since at the behest of the Trustee and after diligent effort, he found the purchaser. . . .”

“The District Court was authorized to make an allowance (Title 11 USCA Sections 641 and 642), and we think that the failure to do so was error.”

It is this same equitable claim for compensation for services rendered to the bankrupt estate in a reorganization proceedings under Title 11 USCA, Sections 641 and 642, which Appellant now claims in this proceeding.

The *Berman* case is almost on all fours with the case now before this Court, and is abundant authority for the allowance of reasonable compensation to the

Appellant for his services in this matter. It is submitted that among other things, the *Berman* case stands for the following propositions which are applicable in this case.

(1) That the District Court sitting in bankruptcy in a corporate reorganization proceeding has equitable jurisdiction, and is not limited to a consideration of the strict legal rights of the parties involved.

(2) That a real estate broker is entitled to an allowance for the reasonable value of services rendered to the Trustee in a reorganization proceeding where his services have benefited the trust estate.

(3) The Bankruptcy Court is authorized to make an allowance for services rendered by a real estate broker under Sections 241 and 242 of the Bankruptcy Act.

(4) That the Bankruptcy Court is authorized to make an allowance to a real estate broker in a reorganization proceeding where his services have been of benefit to the estate even though the employment of the broker has not had prior authorization by the Court.

(5) That a real estate broker is entitled to compensation if his agency is the procuring cause of the sale, and when his communications with the purchaser has been the means of bringing the purchaser and the principal together, his right to compensation is complete.

In addition to the *Berman* case, Appellant invites the Court's attention to the case *In re Industrial Ma-*

chine & Supply Co. (1953), 112 Fed. Sup. 261, 264, involving a petition for allowance in a reorganization proceeding by a wife who in a most informal manner had assisted her husband in the administration of an estate of which he had been appointed Trustee. Her services had never been authorized by the Court, nor was a definite designation given her by the Trustee as an employee of the Debtor. Nevertheless, the Court did find that direct benefit had accrued to the Debtor from her services and upon that basis reasonable compensation was awarded to her for these services. In this case the Court again recognized the equitable claim of the claimant based upon the benefit that her services had been to the estate, and reasonable compensation was awarded accordingly.

Petitioner also called to the Court's attention the case of *In re Buildings Development Co.*, 98 Fed. (2d) 844, in which the Court in awarding compensation used the following language:

“The rule which clearly is deducible from the authorities is that where a party designated by the act renders services in connection with the proceedings and plan the Court may not, without some special justification, refuse to allow any compensation whatever. For successful administration of the statute it is as important that committees who have earned something should get some compensation as it is that they should not get too much. *In re A. Herz, Inc.*, this Court remarked ‘that the discretion thus lodged by statute in the Court must be exercised with judgment and with the double purpose of doing equity to

those distressed and at the same time rewarding faithful and necessary service with reasonable compensation.”

The case of *In re Irving-Austin Building Corporation*, 100 Fed. (2d) 574, was an action for allowance of attorney’s fees for services rendered to a bankrupt estate during reorganization proceedings under Chapter 10 of the Bankruptcy Act. The Court in that case states what Appellant feels is the correct rule in awarding allowances in these reorganization proceedings. The Court states as follows:

“Benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured where no employment by the Court or Trustee exists.” (Emphasis added.)

“This conclusion is confirmed by a study of the rulings in the analogous fields of contract law. Liability for debts is traceable to contractual origin. Express or implied promises are prerequisites to debt liabilities. When A contracts with B for the latter’s services, a case of express agreement arises. The amount of compensation is fixed by the contract or the law inserts the measure of damages known as quantum meruit. If no contract exists and services are rendered, liability arises only when the results and the benefits of the services are accepted by the other party in which case liability arises out of such acceptance of the fruits of the other’s labor. In all such cases liability is measured not by the amount of time and energy expended by the laboring party but by the value of such services to the beneficiary.”

The Court in this case makes it clear that an allowance may be made in reorganization proceedings even when there is no contract with the Trustee, and that the true criteria for an allowance in bankruptcy proceedings under these circumstances is benefit to the estate. This rule is in complete accord with contract law which allows recovery in the amount fixed in the contract when agreed upon, in a reasonable amount if no compensation is fixed in the contract, and in the amount of the benefit received when no contract exists at all but the services are rendered and accepted. The latter is a quasi contractual recovery. The Court goes on to state why this rule is applied in reorganization proceedings:

“This rule not only protects the estate against overcharging for valueless services, but it enables the Court to thoroughly compensate counsel for beneficial services. The protection of counsel who render valuable constructive services is quite as important as protecting the estate against overcharges for services which were of no benefit to the estate. And it should be added that Courts must recognize of necessity a vast difference between the value of successful legal services which create a fund to be distributed, and the value of services which are devoted to an equitable distribution of funds in existence when the reorganization proceedings were begun.”

The case now before this Court is an excellent example of the necessity of rewarding those who have rendered valuable, constructive services in the administration of the estate. Here Appellant actually created a fund in excess of \$4,000,000.00 by the sale of these

assets from which all creditors and stockholders have been paid in full, the Trustee and attorneys have been paid in full, and for which everyone has been paid except the Appellant who created this fund. It is submitted that as a matter of public policy this is the type of services which should be encouraged in these reorganization proceedings, and the type of services for which compensation should be awarded when the services are accepted with such great benefit to the estate. Such a rule of compensation in accord with the benefit received by the estate is completely fair to the creditors and stockholders, and still encourages individuals to render valuable, beneficial services in these reorganization proceedings. Without Appellant's services in this matter the R.F.C. would have foreclosed, and the creditors and stockholders would have received nothing. The value of Appellant's services to the estate and to the stockholders and creditors in this matter is therefore most substantial.

It is apparent that under the applicable statutes and cases Appellant is entitled to reasonable compensation in this matter in accord with the benefit received by the bankrupt estate.

IV.

THE TRUSTEE WAS OBLIGATED TO PAY FOR THE SERVICES OF APPELLANT BOTH UNDER THE LAW OF IMPLIED IN FACT CONTRACTS AND THE LAW OF QUASI CONTRACTS.

The lower Court has found that there was no obligation to pay for the services of Appellant which were

rendered at the request of the Trustee, freely accepted, and of great benefit to the estate. Appellant contends that the circumstances of this case do create an obligation to pay for these services both under the law of implied in fact contract and the law of quasi contract. A statement of the definition of these two types of recovery and of the difference between them is important to the understanding of Appellant's position in this matter.

Williston on Contracts, Volume 1, Page 6, Section 3:

“Contracts are express when their terms are stated by the parties. Contracts are often said to be implied when their terms are not so stated. The distinction is not one of legal effect, but in the way in which mutual assent is manifested. The expression ‘implied contract’ has given rise to great confusion in the law. Until recently the divisions of the law customarily made coincided with the forms of action known to the common law. Consequently, all rights enforced by the contractual action of assumpsit, covenant, and debt were regarded as based on contract. *Some of these rights, however were created not by any promise or mutual assent of the parties, but were imposed by law on the defendant, irrespective of, and sometimes in violation of, his intention.* (Emphasis added.) Such obligations were called implied contracts. A better name is that now generally in use of ‘quasi contracts.’ This name is better since it makes clear that the obligations in question are not true contracts, and also because it avoids confusion with another class of obligations which have also been called implied contracts. This latter class consists of obligations

arising from mutual agreements and intent to promise but where the agreement and promise have not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact."

The distinction between quasi contract and implied in fact contract is also set forth in *Woodward, Law of Quasi Contract* at page 6, Sec. 4, as follows:

*"Quasi contracts distinguished from contracts.—*Only within the last generation have quasi contractual obligations been commonly so called. They were formerly regarded as a species of contract, and *to distinguish them from express contracts and contracts implied in fact* (emphasis added), i.e. contracts in which a promise is inferred from conduct, were called contracts implied in law. Since, like contracts proper, they were enforced by means of the action of assumpsit, it is not surprising that in a period when more importance was attached to the forms of legal remedies than to the nature of substantive rights, the essential dissimilarity of the two obligations was not observed. The persistent failure to recognize it, however, has resulted in confusion and error, and in many cases has wrought serious injustice. It cannot be too strongly emphasized, therefore, that *quasi contracts are in no sense genuine contracts*. The contractor's obligation is one that he has voluntarily assumed. *He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is*

an implication of the promisor's conduct. But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable.” (Emphasis added.)

It is apparent that an implied in fact contract is a true contract the evidence of which is supplied by the conduct of the parties, whereas a quasi contract is an obligation imposed by the law without regard to the understanding or assent of the parties, and even in the face of a refusal to pay, as the result of the receipt of a benefit by one party which it would be inequitable for him to retain without compensation.

The law of quasi contract is derived from the common law, and has general application throughout the law. The law of quasi contract is equally applicable in the Federal Court. The distinction between implied in fact contracts and quasi contracts, and the importance of this distinction, has been pointed out in a recent decision of this Circuit Court in the case of *Hill v. Waxburg*, 237 Fed. (2d) 936, 939 (9th Circuit, October 26, 1956) where the Court states as follows:

“An ‘implied in fact’ contract is essentially based on the intention of the parties. It arises where the Court finds from the surrounding facts and circumstances that the parties intended to make a contract but failed to articulate their promises and the Court merely implies what it feels the parties really intended. It would follow then that

the general contract theory of compensatory damages should be applied. Thus, if the Court can in fact imply a contract for services, the compensation therefore is measured by the going contract rate.

“An ‘implied in law’ contract, on the other hand, is a fiction of the law which is based on the maxim that one who is unjustly enriched at the expense of another is required to make restitution to the other. The intention of the parties have little or no influence on the determination of the proper measure of damages. (Emphasis added.) In the absence of fraud or other tortious conduct on the part of the person enriched, restitution is properly limited to the value of the benefit which was acquired.

“The distinction is based on sound reason, too, for where a contract is all but articulated, the expectation of the parties are very nearly mutually understood, and the Court has merely to protect those expectations as men in the ordinary course of business affairs would expect them to be protected, whereas in a situation where one has acquired benefits, without fraud and in a non tortious manner, with expectations so totally lacking in such mutuality that no contract in fact can be implied, the party benefited should not be required to reimburse the other party on the basis of such parties’ losses and expenditures, but rather on a basis limited to the benefits which the benefited party has actually acquired.”

Appellant contends that he is entitled to an award of compensation in this matter under both the law of quasi contract to prevent unjust enrichment and by

the formation of a true implied in fact contract from the conduct of the parties.

A. There Was an Implied in Fact Contract Between Appellant and the Trustee Arising Out of Their Conduct Irrespective of the Statements of the Trustee.

First, from the point of view of implied in fact contract, the lower Court found and the facts disclose that the services of Appellant were rendered with the full knowledge, cooperation and encouragement of the Trustee, and at the request of the Trustee's attorney; were freely accepted by the Trustee, and were of benefit to the estate. These facts create a true implied in fact contract, the existence and terms of which are manifested by the conduct of the parties. When services are rendered at the request of one of the parties, the acceptance of the services is sufficient conduct to establish a true implied in fact contract. The mutual assent and intent to contract is implied from the conduct of the parties in rendering and accepting the services, rather than their words as in express contracts.

However, the lower Court expressed some reluctance to find a true implied in fact contract from the conduct of the Trustee in accepting these services in this case in view of the evidence of statements by the Trustee that Appellant should obtain his compensation from the Buyer. The Court felt that the evidence of these statements prevented the formation of a true implied in fact contract because of lack of mutual assent. However, the Trustee's statements are in

reality only evidence in conflict with the conduct of the Trustee in accepting these services. Appellant contends that the conduct of the Trustee in accepting the benefit of these services under the facts of this case speak more loudly, and are stronger evidence of his true intent, than any words he may have used. These services were offered by the Appellant with the expectation of compensation, and the Trustee had a full opportunity to reject these services if he did not desire to pay for them. The acceptance of these services and the exercise of dominion over them under these circumstances creates a true implied in fact contract. (See Restatement of Contracts, Section 72, Acceptance By Silence or Exercise of Dominion.)

We have here a conflict in the evidence between the conduct of the Trustee and his words, and Appellant feels that this conflict must be resolved by finding that the conduct of the Trustee in accepting these services created a true implied in fact contract. If "A" picks up an apple from "B's" fruit stand on which there is a sign "5c each", and starts eating it, he has either made a contract to pay for it by his conduct or tortiously converted the property of another. If "A" under the same circumstances picks up the apple, but while he is eating it continually shouts at the top of his voice that he does not intend to pay for it, "A" has not prevented the creation of a contract by his spoken words nor has he eliminated the effect of his unlawful dominion over the property of another. The contract is made, and an obligation to pay for the apple arises from "A's" conduct in

eating the apple, and the contract comes into existence by his conduct irrespective of his words and "B" may waive the tort and sue in contract. The same type of conduct in this case, in spite of the Trustee's statement, has created a true implied in fact contract. As is stated in the Restatement of Contracts, Section 72 (1), the acceptance of the benefit with a reasonable opportunity to reject them will create a true implied in fact contract.

Appellant's services were rendered with the expectation of compensation. This expectation of compensation was reasonably predicated upon the fact that under precisely the same circumstances Appellant was paid compensation for similar services rendered to the Trustee in the Nielson transaction. The Trustee freely accepted these services knowing that the buyer refused to pay for them, and that no arrangement for compensation by the buyer had been made since he foreclosed Appellant from participating in the final negotiations. The only logical inference that can be drawn from this conduct by the Trustee is that he intended to pay for these services himself. His conduct could not mean anything else. He and/or his agent had requested services that had to be paid for, and no one else would pay. The acceptance of these services under these circumstances created a contract to pay for them manifested by the conduct of the parties.

This legal principle of assumption of obligation by the acceptance of benefit has been codified in the State of California:

California Civil Code Section 1589:

“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”

In the recent case of *Desney v. Wilder*, 46 Cal. (2d) 715, 299 Pac. (2d) 257 (June, 1956) the Supreme Court of California set forth a clear and lengthy analysis of the law of implied in fact and implied in law or quasi contract and recognizes both doctrines as being fully applicable in California. The decision further substantiates that there are genuine implied in fact contracts of both the meeting-of-the-mind and the no-meeting-of-the-mind variety, and the Court quotes from an article by Mr. Williston in 14 Illinois Law Review, 85, 90 as follows:

“The parties may be bound by the terms of an offer even though the offeree expressly indicated dissent, *provided his action could only lawfully mean assent.* (Emphasis added.) A buyer who goes into a shop and asks and is given (told) the price of an article, cannot take it and say ‘I decline to pay the price you ask, but will take it at its fair value.’ He will be liable, if the seller elects to hold him so liable, not simply as a converter for the fair value of the property, but as a buyer for the stated price.” (Citing cases.)

B. The Law of Quasi Contract Imposes by Law an Obligation to Pay for Services Which Are Freely Accepted and Beneficial Irrespective of the Intent or Statement of the Parties.

In the absence of a true implied in fact contract, and in the face of the Trustee's statement that he would not pay Appellant, there is still an obligation imposed by law upon the Trustee to pay reasonable compensation for Appellant's services in this matter which were accepted by the Trustee and beneficial to the estate. The Court in its Memorandum and Order of January 26, 1955, stated that it could not torture an agreement out of the facts in this case; and that although equity could enforce an express or implied contract, equity could not make the contract where there was in fact no understanding upon which it could be founded. (Tr. 54 and 55.) Attention is invited to the law of quasi contract wherein a quasi contractual obligation is imposed by law and equity irrespective of the understanding or mutual assent of the parties, and even in the face of an expressed refusal to pay, when in equity and justice there is an obligation to pay. In this exact situation where there has been an acceptance of the benefit of services under ambiguous circumstances, or where there has been no agreement for compensation, the Courts have for many years implied by law an obligation to pay for the services thus accepted, and this obligation is imposed by the law without regard to the existence of a true contract.

The law of quasi contract raises by law an obligation to pay the reasonable value of services rendered

respective of the intentions or agreements of the parties.

27 *Cal. Jur.* p. 198, Section 2:

“A contract implied by law, on the other hand, is not a contract at all, but a quasi or constructive contract, an obligation imposed by law regardless of any agreement. (Emphasis added.)

Actions on quantum meruit to recover the reasonable value of services rendered are based on such a quasi contractual obligation, the fundamental principle involved being that no person can conscientiously retain the benefit of another's labor without paying a reasonable compensation therefor.”

27 *Cal. Jur.* p. 199, Section 4:

“As a general rule, where one performs valuable services for another, the law raises an implied promise to pay a reasonable compensation therefor, unless they are performed under circumstances which show that they were to be gratuitous.”

This obligation imposed by the law will prevail against the intent of defendant not to pay, or statements that he will not pay for the services.

5 *Cal. Jur.* (2d) 528, Section 4:

“The implied contract may arise from the conduct of the parties, as where goods are sold and delivered by one person to another at the latter's request. Although there may be no agreement as to payment, the law will raise a contract implied in fact to pay the reasonable value of such goods. The contract so implied will prevail against the

actual intent of a defendant not to pay.” (Emphasis added.)

7 *Corpus Juris Secundum*, p. 111, Section 4:

“While originally the action of *assumpsit* was limited in its scope to true contracts, a true contract, in the sense that the parties have entered into an actual agreement, is not now considered essential, as the courts have extended the remedy to include cases where the obligation arises not out of contract, but from the application of equitable principles to the circumstances. *In such a case, the obligation and the fictitious promise out of which it, in theory, springs are imposed by law without reference to the intention of the parties and often against their expressed intentions, for the purpose of allowing the remedy by action of assumpsit.*” (Emphasis added.)

The law of quasi contract is more fully explained in the following quotation:

12 *Am. Jur.* pp. 502-503, Section 6:

“Both express contracts and contracts implied in fact are based on consent. Evidently, in view of the fact that these are the contracts which are usually before the Courts, it has been said that there is no contract without the consent of the parties. Clearly, such an observation must have been made without regard to the existence of certain legal duties which, though of a contractual nature, are not based on consent. These are sometimes spoken of as contracts implied in law, but are more properly called quasi contracts or constructive contracts. They are contracts in the sense that they are remediable by the contractual

remedy of assumpsit. In the case of such contracts, the promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. *The intention of the parties in such case is entirely disregarded while in the case of express contracts and contracts implied in fact the intention is of the essence of the transaction. As has been well said, in the case of actual contracts the agreement defines the duty, while in the case of quasi contracts the duty defines the contract. A quasi contract has no reference to the intention or expression of the parties.* (Emphasis added.) The obligation is imposed despite, and frequently in frustration of their intention. For a quasi contract neither promise nor privity, real or imagined, is necessary. In quasi contracts the obligation arises, not from consent of the parties, as in the case of contracts express or implied in fact, but from the law of natural immutable justice and equity. The act, or acts from which the law implies the contract must, however, be voluntary. Where a case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation."

The law of quasi contract is based upon equitable principles.

12 *Cal. Jur.* (2d) p. 191:

"It is apparent from these examples that such an obligation, although contractual in the sense that it is remediable in assumpsit, lacks the element

of consent, which is an essential ingredient of an actual contract. The law imposes the obligation irrespective of the intention of the parties *In other words, a quasi contractual obligation arises without reference to assent. It is elementary that such an implied contract has its foundation in the doctrine of unjust enrichment.* (Emphasis added.) It has been stated otherwise that the only promise implied by law is a promise based upon the equitable doctrine that the promisor, having received the benefit, should pay its reasonable value. The action in such cases is in form *ex-contractu*; but the alleged contract is purely fictitious, the right to recover does not depend on any principle of privity of contract, and no privity is necessary. Although the action is at law, the right to recover is governed by principles of equity.”

5 *Cal. Jur.* (2d) p. 526:

“The extensive use of action (*Assumpsit*) to recover on quasi contracts, where in fact no contract exists other than that created by the fiction of the law to prevent unjust enrichment is based on equitable principles, and both the plaintiff’s recovery and the defenses against his claim are governed by equitable considerations.”

It is apparent from these citations that in the absence of an agreement or understanding between the parties, and even in the face of expressed intention of one of the parties not to pay, the law does impose an obligation in quasi contract to pay for services rendered at the request of one party accepted by him, and of benefit to him. This obligation is imposed by

the law to do justice and equity between the parties and to avoid unjust enrichment and is not affected by the absence of agreement or understanding between the parties.

There are obviously a great number of cases dealing with the law of quasi contracts and its application. It is not necessary to review all of these cases. The general rule of these cases is shown by the text citations hereinabove set forth.

It should be noted that the law of quasi contract is a rule of the common law based on the common law notions of assumpsit and indebittatus assumpsit. The common law is of course applicable in both State and Federal Courts. (*Hill v. Waxburg*, supra, 237 Fed. 2d) 936.)

The following propositions illustrate the application of the law of quasi contract to the facts of this case, and the following propositions are supported by the cases cited.

1. *In the complete absence of any understanding or intent to contract, and even in the face of an express refusal to pay, there is a quasi contractual obligation to pay for services which have been accepted and acquiesced in.*

Vangel v. Vangel, 45 AC 828, 291 Pac. (2d) 25.

This case involves a dissolution of a partnership and defendants claim for the reasonable value of services rendered to the partnership after the dissolution. There was no evidence of any request for these serv-

ices, or any evidence of any agreement to pay for them. In fact, the lower Court had found that defendant was a volunteer who had rendered services against the wishes and directions of the plaintiff. However, the Supreme Court held in this case that the mere acceptance of the services, without any request or without any agreement or understanding in regard to compensation, was sufficient to support a recovery by defendant for his services, and that it would be inequitable to deny defendant compensation for his services when his brother acquiesced in them. This is a clear quasi contractual recovery awarding compensation for services rendered and accepted without any evidence of request and without any evidence of mutual consent or understanding in regard to payment.

To the same effect is the case of *Philpott v. Superior Court*, 1 Cal. (2d) 512, 36 Pac. (2d) 635, which contains a lengthy and comprehensive treatment of the development of the law of quasi contract as well as an analysis of its application. This discussion makes it clear that the law of quasi contract is a legal fiction based upon equitable principles of justice and fairness. Because it is a legal fiction imposed irrespective of the intent of the parties, even an expressed refusal to pay cannot affect this obligation created by the law. The Court in this case stated as follows:

“This doctrine is also expressly endorsed in *Halidie v. Enginger*, supra, 175 Cal. at page 508 166 P. (2d) 1: ‘In some instances the action on implied contracts does not in truth rest upon con-

tracts at all. In others the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong. *Thus, where A delivers goods to B at B's request, even though B never meant to pay for them, the law erects the legal fiction that he promised to pay, (emphasis added) and he will not be heard to deny it in the action for quantum valebait in assumpsit'.*"

These cases illustrate that evidence of statements by the Trustee that he would not pay a commission to Appellant has absolutely no effect upon a quasi contractual recovery. The promise to pay is a legal fiction raised by the law in the interest of justice and equity from the acceptance of the benefits, and statements by the Trustee refusing to pay have no effect upon this law imposed obligation.

3. *Services rendered in procuring a purchaser for assets of the seller will give rise to a contractual obligation to pay for such services when accepted.*

Freeman v. Jergins, 125 Cal. App. (2d) 536, 271 Pac. (2d) 210.

In this case defendant accepted plaintiff's services in procuring a purchaser for certain stock belonging to defendant. There was no evidence of any agreement or understanding between the plaintiff and defendant in regard to these services or the payment for them. In fact, all evidence of any agreement or understanding between these parties has been stricken from the record because of the death of defendant Cotton. The

Court, found, however, that these services had been rendered by plaintiff with the expectation of compensation, that defendant accepted and had the benefit of plaintiff's services, and that the recipient thereby had an obligation to pay the reasonable value thereof. This case makes it clear that Appellant is entitled to a quasi contractual recovery of the reasonable value of his services in procuring the purchaser for the assets of this estate. This type of service in procuring a purchaser for assets is a proper basis for quasi contract where the services are accepted, and the acceptance of these services will give rise to this obligation even in the absence of any agreement or understanding between the parties.

C. *Where the recipient has intentionally or unintentionally misled plaintiff in inducing him to render services, plaintiff will be entitled to the reasonable value of his services in quasi contract.*

Lazzarevich v. Lazzarevich, 88 Cal. App. (2d) 708, 200 Pac. (2d) 49.

The Court in this case applied the law of quasi contract to support a recovery by plaintiff of the reasonable value of her services during an invalid marriage which she believed in good faith to be valid. This mistaken belief was caused by defendant's representations, and this mistaken belief induced plaintiff to render these services. The Court held that plaintiff was entitled to compensation for the services that had been rendered under this mistaken belief, and held that this quasi contractual recovery would be allowed

whether the misrepresentations were fraudulently or innocently made. (See also *Restatement of Restitution*, Section 40). These citations illustrate that the intentional or unintentional misleading of Appellant by the Trustee's conduct in the Nielson transaction, and the statements of Mr. Carr that he would be paid, are an additional ground for the application of quasi contractual recovery.

9. *Quasi contractual recovery is given in Reorganization proceedings under the Bankruptcy act to compensate petitioners who have rendered services which were accepted and of benefit to the Debtor estate.*

In re Irving-Augustin Building Corporation,
(supra), 100 Fed. (2d) 554.

This was an action for an allowance for services rendered to a bankrupt estate during reorganization proceedings under Chapter 10 of the Bankruptcy Act. The Court in that case states what Appellant feels is the correct rule in awarding allowances in these reorganization proceedings. The Court stated as follows:

"Benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured where no employment by the Court or Trustee exists."

"This conclusion is confirmed by a study of the rulings in the analogous fields of contract law. Liability for debts is traceable to contractual origin. Express or implied promises are prerequisite to debt liabilities. When A contracts with B for the latter's services, a case of express

agreement arises. The amount of compensation is fixed by the contract or the law inserts the measure of damages known as quantum meruit. *If no contract exists, and services are rendered liability arises only when the results and the benefits of the services are accepted by the other party in which case liability arises out of such acceptance of the fruits of the other's labor* (Emphasis added.) In all such cases liability is measured not by the amount of time and energy expended by the laboring party, but by the value of such services to the beneficiary."

This bankruptcy case is clear authority for quasi contractual recovery in bankruptcy proceedings. To the same effect are the cases of *In re Buildings Development Co.*, 98 Fed. (2d) 844; and *In re Industrial Machine & Supply Co.* (supra), 112 Fed. Sup. 261 264.

The case of *Berman v. Palmetto Apartment Corp.* (supra), 153 Fed. (2d) 192, which has already been discussed in this brief, is another case where the Court awarded compensation to a real estate agent for services rendered based upon benefit to the estate and in the interests of justice and equity and even in the absence of any contract or legal claim. The *Berman* case is also apparently a case of quasi contractual recovery.

V.

PRIOR AUTHORIZATION IS NOT REQUIRED IN BANKRUPTCY
PROCEEDINGS WHERE COMPENSATION IS BASED ON
BENEFIT TO THE ESTATE.

It appears from the cases that reasonable compensation has often been allowed by the Court in bankruptcy proceedings for services rendered to the Debtor state which are beneficial to the estate without prior authorization for these services having been obtained from the Court. In this situation the compensation has been in accord with the benefit received.

This is to be distinguished from the situation where claim is made against the estate based upon an express contract fixing a definite contract price, in which situation the Courts may require prior authorization for such an express contract in order to protect the estate from any excessive charge which may be fixed in the contract. However, that is not this case.

Here Appellant seeks compensation for services beneficial to the estate, and in accord with the benefit which was received by the estate. Here the measure of compensation is the value of the benefit to the estate. As the Court stated in the case of *In re Irving-Austin Building Corp.* (supra), 100 Fed. (2d) 574, "benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured, where no employment by the Court of Trustee exists." This rule of allowing compensation in accord with the benefit received by the estate when no prior authorization has been obtained,

allows the Court to reward those who have rendered services beneficial to the estate, and also protects the estate against charges for valueless services from which the estate derives no benefit.

This same principle of awarding compensation in accord with benefit to the estate even when there has been no contract for the services and when the services have not been previously authorized by the Court has been followed in the case of *Berman v. Palmetto Apartment Corp.* (supra), 153 Fed. (2d) 192; in the case of *In re Building Development Co.* (supra), 98 Fed. (2d) 844; in the case of *In re Industrial Machine & Supply Co.* (supra), 112 Fed. Sup. 261, 264; and in the case of *In re Equitable Office Building Co.*, 88 Fed. Sup. 531. In fact, Appellant was awarded a commission of 5% of the sales price of certain cutting contracts in this very proceeding in the Nielson transaction without any prior authorization for his services from the Court.

The services of real estate brokers and other agents are essential to the successful administration of a bankrupt estate. In order to obtain these essential services there must be some basis for compensation. In this case, as in many cases, it was impossible to determine prior to the rendition of the services which of the many real estate brokers encouraged by the Trustee to participate in the sale of the assets of the Debtor estate would be successful in obtaining a purchaser for the said assets, and it was therefore impos-

able to obtain prior Court approval for the said services.

It is submitted that awarding compensation in accord with the contract price when the contract has received prior approval of the Court, and compensation in accord with benefit to the estate pursuant to the rule in the above cited cases when there has been no prior approval for the services is a solution to this problem. Such a rule is fair to the Debtor estate which has received the benefit, and still provides a basis for compensating those whose services are essential to the successful administration of a bankrupt estate.

Without such a rule of compensation this estate and others would end in a foreclosure by secured creditors; whereas a rule of compensation for successful services in accord with benefit to the estate as set forth in the cases above cited is a basis for obtaining participation by specialists in these bankruptcy proceedings.

CONCLUSION.

In conclusion it is submitted that as a matter of law, and/or equity, to prevent unjust enrichment and a harsh result in this case, and as a matter of sound public policy, Appellant should be reasonably compensated for loyal, unofficious, meritorious and highly beneficial services rendered to the Debtor estate on

any one or all of the legal concepts set forth herein-
above in detail.

Dated, September 20, 1957.

Respectfully submitted,

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No. 15,583

IN THE

United States Court of Appeals
For the Ninth Circuit

ALEX E. WILSON,

Appellant,

vs.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a corpo-
ration, Debtor,

Appellee.

Appeal from the United States District Court for
the Northern District of California,
Northern Division.

APPELLEE'S BRIEF.

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No. 15,583

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vs.

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ration, Debtor,

Appellee.

**Appeal from the United States District Court for
the Northern District of California,
Northern Division.**

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

1. INTRODUCTION.

This case involves an Order entered by the United States District Court for the Northern District of California, Northern Division, in proceedings for the reorganization of Coastal Plywood & Timber Company, a corporation, pursuant to Chapter X of the National Bankruptcy Act. Such reorganization proceedings were commenced on July 6, 1951, by the filing of a creditors' petition. On

November 1, 1951, the District Court entered an Order appointing Fred G. Stevenot, Appellee herein, as Trustee of the estate of the Debtor, and Appellee has served as such Trustee continuously since said date.

On December 21, 1953, the Trustee filed with the District Court his Second Plan of Reorganization of the Debtor, which Plan was approved by the District Court on January 7, 1954, accepted by the requisite votes of stockholders and creditors between January 7, 1954 and March 16, 1954, and confirmed by the District Court on March 16, 1954 (Tr., p. 96). Said Plan encompassed, among other things, a sale of substantially all of the Debtor's assets to Sugarman Lumber Company, which sale was consummated on April 16, 1954 (Tr., pp. 96-97).

On May 25, 1954, Alex E. Wilson, Appellant, filed with the District Court a petition for allowance of a real estate broker's commission in the sum of \$222,613.75 on the above-mentioned sale (Tr., p. 19). The Trustee and the Debtor objected to the allowance of any sum to Appellant and, following a full hearing and consideration of the authorities, the District Court issued its Memorandum and Order, dated January 26, 1955, denying any allowance to Appellant. (Tr., pp. 50-55.) Thereafter proposed findings of fact and conclusions of law were submitted by both parties. (Tr., pp. 55, 66.) Prior to entry of final judgment, however, Appellant filed a motion for reconsideration. (Tr., p. 75.) After further argument and submission of authorities, the District Court issued its Memorandum denying such motion. (Tr., pp. 84-89.) Findings of Fact and Conclusions of Law of the District Court were filed on March 19, 1957, and a Judgment and Order

denying Appellant's claim was entered on March 20, 1957. (Tr., pp. 89-102.)

On April 15, 1957, Appellant filed with the District Court a Notice of Appeal from the judgment so entered. (Tr., p. 103.) As hereinafter noted in the Argument, Appellant did not file with this Court any petition for leave to appeal, as required by the Bankruptcy Act and the applicable decisions.

2. STATEMENT OF THE FACTS.

Appellant's Statement of the Case includes, and his argument is based upon, a number of alleged facts which are not supported by, and in fact are contrary to, the evidence herein. The more important instances of such departure from the evidence will be reviewed following a summary of the actual facts as clearly established by the evidence and included in the findings of the District Court.

While Appellant's claim is based upon a transaction which occurred in the latter part of 1953 and early 1954, Appellant seeks to bolster his claim by reference to a transaction which occurred in 1952. Accordingly, it is necessary to review such prior transaction as well as the specific sale to which Appellant's claim relates.

Appellant's first contact with either the Debtor or the Trustee occurred in July, 1952, at which time he called upon the Trustee and stated that he had a buyer for certain timber contracts then owned by the Debtor (Tr., pp. 90, 345, 346.) These contracts entitled the Debtor

to cut timber from certain lands owned by others but contained several restrictive conditions, including an extremely limited term for the removal of timber and severe requirements relating to the clearing of the land. (Tr., pp. 6-7, 300-301.) The Trustee was then endeavoring to negotiate changes in these contracts, which would enable the Debtor to take advantage thereof, but he was unable to negotiate the desired changes and subsequently determined that it was in the best interests of the Debtor's estate that these contracts be sold. (Tr., pp. 90, 346.) The Trustee informed Appellant in late July or early August that the contracts were then for sale, and further informed Appellant that the Trustee would not pay any commission on any sale and that any compensation to Appellant would have to be paid by his buyer. (Tr., pp. 90, 346-347.) On August 19, 1952, Appellant, on behalf of Clarence L. Nielson, submitted to the Trustee a proposal for the purchase of said contracts, conditioned upon the ability of Clarence L. Nielson to negotiate changes in the contracts satisfactory to him. (Tr., pp. 7, 90, 397.) Clarence L. Nielson was not successful in negotiating the desired changes in the contracts, and the Trustee therefore did not submit this proposal to the District Court for approval. (Tr., pp. 7, 90-91, 397.)

Thereafter, on October 11, 1952, Clarence L. Nielson and his wife presented to the Trustee a new offer to purchase the above-mentioned timber contracts for a gross price of \$100,000, which offer was subject to the express condition that the sum of \$5,000 be paid to Appellant out of such gross price. (Tr., pp. 7-8, 90-91, 348-349, 398-399.) The Trustee vigorously objected to the condition that Ap-

pellant be paid \$5,000 out of the gross price. (Tr., pp. 91, 398-399.) The Nielsons, however, refused to eliminate this condition and insisted that \$5,000 be paid to Appellant and that their offer be accepted immediately in the form submitted, in order to avoid further delay. (Tr., pp. 91, 398-399.) The Nielsons insisted upon such immediate acceptance because of the short period provided by the contracts for removal of timber. (Tr., pp. 304-305, 354, 399.) The Trustee thereupon agreed to submit the Nielson offer to the Court without change and filed a petition with the District Court, presenting said offer. (Tr., pp. 3-9, 91, 354, 399.) In his petition the Trustee fully advised the District Court and all interested parties that the offer was conditioned upon the payment to Appellant of \$5,000 of the proceeds of the sale. (Tr., pp. 3-9, 91, 398.) Thereafter, on November 3, 1952, a hearing on the Trustee's petition was held before the District Court, notice of which hearing was given to all creditors and stockholders of the Debtor. (Tr., pp. 17-18, 91.) On November 12, 1952 the District Court issued its Order approving the offer and authorizing the Trustee to consummate the sale in accordance with the terms of the offer. (Tr., pp. 17-18, 91-92.)

Appellant did not represent the Trustee or the Debtor in the above-described transaction, but represented and acted on behalf of the Nielsons. (Tr., p. 92.) The above-mentioned condition that \$5,000 be paid to Appellant from the proceeds of the sale was inserted in the Nielson offer pursuant to an earlier agreement between Appellant and the Nielsons, in which the Nielsons agreed to require the Debtor to pay an unspecified sum to Appellant, and Ap-

pellant received said sum solely because of said condition. (Tr., p. 92.) (This agreement was produced by Appellant following the trial and admitted as Exhibit D pursuant to stipulation, but is not quoted in the transcript. (Tr., p. 425.)) As hereinafter discussed, Appellant also performed other services for the Nielsons in connection with this transaction.

During this same period and thereafter, the Trustee was endeavoring to develop a Plan of Reorganization of the Debtor, as contemplated by Chapter X of the National Bankruptcy Act. (Tr., pp. 92, 400.) Prior to July, 1953, he devoted his efforts to development of a Plan which would not involve the disposition of the Debtor's assets, and which would preserve for the stockholders of the Debtor their equity interest in its business and properties. (Tr., pp. 92, 400-401.) On June 15, 1953, the Trustee filed with the District Court his First Plan of Reorganization of the Debtor, which Plan did not contemplate the sale of any assets of the Debtor, but, rather, contemplated the retention of all of its properties, the sale of additional capital stock and the creation of a voting trust for the protection of creditors. (Tr., p. 93.) (This finding was based upon the Plan itself and other files in the reorganization proceedings, all of which were admitted in evidence pursuant to stipulation. (Tr., pp. 340-341.)) In July, 1953, the Reconstruction Finance Corporation, the principal creditor of the Debtor, notified the Trustee that it would not accept said First Plan of Reorganization, and the Trustee then determined that it was necessary to sell the assets of the Debtor to avert foreclosure. (Tr., pp. 93, 402-403.)

While engaged in his efforts to develop a Plan of Reorganization, the Trustee was contacted by a number of brokers and other persons, including Appellant, who purported to be interested in the Debtor's reorganization. (Tr., pp. 93, 357, 407.) The Trustee cooperated with all such persons, including Appellant, by furnishing information concerning the Debtor and its properties and permitting them to inspect its properties. (Tr., pp. 93, 407.) Prior to July, 1953, however, the Trustee expressly informed Appellant that the Trustee was not interested in a sale of the Debtor's properties but was endeavoring to develop a Plan of Reorganization which would preserve for the Debtor's stockholders an equity participation in the Debtor's properties and operations. (Tr., pp. 93, 356, 358, 400-401.) Moreover, in order to protect the Debtor's estate against depletion as the result of claims for brokerage commissions and related compensation, the Trustee expressly notified Appellant and such other brokers that neither the Trustee nor the Debtor would employ any broker or pay any commission in connection with any plan of reorganization. (Tr., pp. 93-94, 356-358, 404-405.) Appellant was expressly and unequivocally notified by the Trustee, both verbally and in writing, from time to time throughout the period of Appellant's alleged services, that if Appellant endeavored to develop any plan of reorganization he must represent and be compensated by the proponents of such plan. (Tr., pp. 93-94, 356-358, 404-405.)

The evidence with respect to Appellant's contact with the sale of substantially all of the Debtor's assets in April, 1954, is vague and confusing. Appellant's activ-

ities, as made known to the Trustee, were conducted in association with a Mr. William Steinberg. The evidence showed that on July 23 or July 24, 1953, the Trustee received from Mr. Steinberg an offer, purportedly on behalf of J. J. Sugarman Co. of Los Angeles, California, to purchase all of the Debtor's assets for a price of \$3,750,000. (Tr., pp. 95, 156-159.) The Trustee was aware that Appellant had participated in the preparation of this offer, but at the time the Trustee received such offer, both Appellant and Mr. Steinberg advised the Trustee that Appellant was being compensated by Mr. Steinberg. (Tr., pp. 95, 394, 406-407.) The evidence showed, and the Court found, that on July 22, 1953 Mr. Steinberg had entered into an oral agreement with Appellant, in which Mr. Steinberg agreed to pay Appellant \$25,000 for Appellant's services in bringing the Debtor to Mr. Steinberg's attention, and that this verbal agreement was confirmed by a letter from Mr. Steinberg to Appellant dated August 25, 1953, admitted in evidence. (Tr., pp. 95-96, 288-289, 394, 406-407.)

The Trustee rejected the above-mentioned offer of Mr. Steinberg and informed Mr. Steinberg that he would require an offer of at least \$4,250,000. (Tr., pp. 95, 193, 406.) Mr. Steinberg testified that this offer had actually been submitted on behalf of a group of four individuals, to-wit, N. N. Sugarman, a Mr. Jamieson, Sam Steinberg and a Mr. Margolis, and following the Trustee's rejection of the offer only Mr. Jamieson remained interested in purchasing the Debtor's assets. (Tr., pp. 197-198.)

In October, 1953, the Trustee was contacted by Mr. N. Sugarman and Mr. B. Margolis, who engaged in extensive

negotiations on behalf of Sugarman Lumber Company for the purchase of the assets of the Debtor. (Tr., pp. 96, 407-408.) Such negotiations culminated in the presentation to the Trustee, on December 12, 1953, of an offer by Sugarman Lumber Company to purchase the assets of the Debtor. (Tr., pp. 96, 408.) This offer was incorporated by the Trustee as part of a Second Plan of Reorganization of the Debtor, filed with the District Court on December 21, 1953. (Tr., pp. 96, 408.) On January 7, 1954, the District Court entered an Order approving said Second Plan of Reorganization and directing that it be submitted to the creditors and stockholders of the Debtor for their votes; and on March 16, 1954, following the acceptance of said Plan in writing by more than two-thirds of each class of creditors of the Debtor, and more than a majority of the stockholders of the Debtor, the District Court entered its Order confirming said Second Plan of Reorganization, as amended during the proceedings, and directed the Trustee to consummate said Plan. (Tr., p. 96.) On April 16, 1954, the Trustee, pursuant to said Order and Plan, conveyed the assets of the Debtor to Sugarman Lumber Company, and, prior to the filing of Appellant's petition herein, the Trustee had taken substantially all of the remaining steps required for the consummation of said Plan. (Tr., pp. 96-97.) (The findings referred to in this paragraph were based, in part, upon the record of proceedings in connection with the Trustee's Second Plan of Reorganization.)

Thus far, it is obvious that Appellant's contact with the sale to Sugarman Lumber Company was ambiguous and limited. It was indicated at the trial, in the testimony

of Mr. Steinberg and Appellant, that the prospective purchasers for whom Mr. Steinberg was acting in July, 1953 had required that arrangements be made by Mr. Steinberg for one or more resales of certain of the assets to be purchased. (Tr., p. 172.) Mr. Steinberg further testified that such resales were arranged by him with at least four separate purchasers, one of whom (a Mr. Fred Holm) was introduced to Mr. Steinberg by Appellant. (Tr., pp. 172-173.) The other purchasers were introduced to Mr. Steinberg by Mr. Holm. (Tr., pp. 175-176, 203.) There was evidence that Sugarman Lumber Company did resell a substantial portion of the assets of the Debtor to the purchasers with whom Mr. Steinberg had negotiated, including Mr. Holm. (Tr., pp. 203-204.) Sugarman Lumber Company, it appeared, was owned by five individuals, including two of the persons for whom Mr. Steinberg acted in submitting his offer in July, 1953. (Tr., p. 212.) In view of Appellant's association with Mr. Steinberg, and his assistance to Mr. Steinberg in the procurement of resales for the Sugarman group, the trial court concluded that Appellant's activities had benefited the Debtor's estate.

The evidence further showed, and the District Court found, that Appellant entered into an agreement with Mr. Holm, one of the above-mentioned purchasers, to pay over to Mr. Holm a portion of any compensation which Appellant might receive in connection with this transaction. (Tr., pp. 95-96, 229, 232-233.)

As the District Court found, Appellant was clearly and unequivocally notified by the Trustee, both verbally and in writing, repeatedly during the course of the transaction

for which Appellant seeks compensation, that neither the Debtor nor the Trustee would employ any broker or agent or pay any commission or compensation to any agent in connection with any plan of reorganization or sale. (Tr., pp. 97-98, 357-358, 401, 404-405, 409-410.) Appellant never advised the Trustee that he expected or would seek compensation from the Debtor or the Trustee until May, 1954, after the Trustee's Second Plan of Reorganization, including the sale to Sugarman Lumber Company, had been consummated. (Tr., pp. 98, 410-413.)

As the District Court further found, the Trustee relied upon his understanding with Appellant that Appellant was not representing the Trustee or the Debtor and did not expect any compensation from the Trustee or the Debtor. (Tr. pp. 98-99, 413.) In reliance upon such understanding, the Trustee submitted his Second Plan of Reorganization to the District Court and to the creditors and stockholders of the Debtor for approval. (Tr., pp. 98-99, 413.) Neither the Second Plan of Reorganization nor any instrument filed with the District Court prior to the filing of Appellant's petition in May, 1954, disclosed to the Court or to the creditors or stockholders of the Debtor that a commission or other compensation might be payable to Appellant, or any other broker, in connection with the Second Plan of Reorganization or the sale to Sugarman Lumber Company encompassed therein. (Tr., pp. 98, 413.) The District Court approved and confirmed said Second Plan of Reorganization, the creditors and stockholders of the Debtor submitted their binding acceptances of said Plan, and the Trustee proceeded to consummate the sale and other steps contemplated by the Plan, in complete

ignorance of the claim upon which Appellant now seeks to recover. (Tr., pp. 98, 410-413.)

3. APPELLANT'S STATEMENT OF THE CASE IS CONTROVERTED.

The Statement of the Case set forth in Appellant's Opening Brief is incomplete and misleading and in many respects totally unsupported by the record and squarely contrary to the evidence and to the findings made by the trial court.

In this connection, it should be noted that Appellant's Statement of the Case is based almost entirely on Appellant's own testimony and that, as hereinafter discussed, such testimony was in several important respects contradicted by the documentary evidence, by testimony of other witnesses for Appellant and by the Trustee's testimony. It is apparent from the evidence and from the findings and decision of the trial court that Appellant was not considered to be a credible witness.

a. Appellant's Version of the Nielson Transaction Is Contrary to the Evidence and to the Findings of the Trial Court.

Appellant contends that his position in the Nielson transaction was identical with his position in the sale to Sugarman Lumber Company which occurred many months later. As previously noted, the Nielson transaction involved a sale of timber cutting contracts in the course of the Trustee's administration of the Debtor's estate. Appellant asserts that he was authorized by the Trustee to sell these contracts on behalf of the Debtor, that after

three months of searching for a buyer he did sell such contracts and received a commission from the Debtor, and that no prior court authorization was obtained for his employment. These assertions are contrary to the trial court's findings and the evidence.

Appellant's testimony that he worked for three months trying to sell these contracts, and "*finally* found one of my clients, Mr. Clarence Nielson, and his wife, Amy K. Nielson" (Tr., pp. 137-138, 143), was clearly false. As Appellant was forced to concede in his subsequent testimony, the evidence showed that Appellant was acting for Mr. Nielson at the very first time he contacted the Trustee early in July, 1952. Thus, there was admitted in evidence a letter from Appellant to the Trustee, dated *July 9, 1952*, immediately after Appellant called on the Trustee for the first time, in which Appellant stated (Tr., p. 298):

"*Mr. Nielson* (Clarence L. Nielson) was called out of town but will be back Friday. He is my prospective purchaser, *as I told you.*"

The evidence further showed that a short time thereafter, on August 19, 1952, Mr. Nielson submitted to the Trustee a written offer to purchase said contracts, subject to certain conditions. (Tr., pp. 7, 145-146, 397.) Moreover, ten days prior to the submission of such offer, on August 9, 1952, Mr. Nielson and his wife had entered into an agreement with Appellant in which they had agreed to require the Debtor to pay Appellant's "costs" in connection with the proposed sale, and further agreed to pay Appellant a brokerage fee for procuring said contracts for them. (Tr., p. 92.) This agreement was pro-

duced by Appellant after the trial and admitted as Trustee's Exhibit D. (Tr., p. 425.)

As the trial court found:

“* * * Pursuant to said agreement, the said Nielsons inserted in their offer to the Trustee the aforesaid condition that \$5,000 be paid to petitioner from the proceeds of the sale, and petitioner received said sum from said proceeds *solely because of said condition.*” (Tr., p. 92.)

The evidence on this point was clear and uncontradicted. Thus, the evidence showed that Mr. Nielson's subsequent and final offer to purchase the contracts for the sum of \$100,000 expressly provided that such offer was “subject to a real estate commission of \$5,000”. (Tr., p. 11.) The evidence further showed that following receipt of this offer, the Trustee and his counsel held a conference with Mr. Nielson, Mrs. Nielson and Appellant, at which the Trustee insisted that the Nielsons remove from their offer the requirement that \$5,000 be paid to Appellant, but Mr. Nielson flatly refused. (Tr., pp. 348-349, 354, 398-399.) As the Trustee emphatically testified:

“Yes, it [the payment to Appellant] was a *condition* imposed upon me by Mr. Nielson.” (Tr., p. 348.)

* * * * *

“Beyond that he *insisted* that I pay Mr. Wilson \$5000.” (Tr., p. 349.)

* * * * *

“* * * it [the payment to Appellant] was a condition imposed on me by Mr. Nielson and it was submitted to the Court.” (Tr., p. 354.)

* * * * *

“Mr. Nielson reacted by telling me that he would only pay a hundred thousand dollars and *he insisted that \$5000 of it be paid to Mr. Wilson.*

“We had considerable discussion over the matter and did not reach a conclusion, and Mr. Wilson left my office.

“I tried at that time to get Mr. Nielson to eliminate the question of the commission and pay me the hundred thousand dollars. *He refused. I repeated that several times.*” (Tr., pp. 398-399.)

This testimony of the Trustee is uncontradicted.

The offer of Mr. Nielson thus was, in reality, only \$95,000, and the Trustee finally concluded that this was a fair price for the contracts in question. (Tr., p. 399.) First, however, the Trustee requested that the offer be amended to reduce the price to \$95,000 and eliminate the condition that \$5,000 be paid to Appellant, but Mr. Nielson insisted that the Trustee accept it immediately in the form submitted because time was of the essence. (Tr., p. 354.) As the Trustee testified:

“The Court: In that connection did you ever discuss with Mr. Nielson the proposition of reducing the price of the cutting rights as far as the estate was concerned to \$95,000 and letting Mr. Nielson take care of Mr. Wilson?

“A. I did, your Honor, exactly that.

“Q. And what happened?

“A. Mr. Nielson refused to do it. He said the time element was very important, and it was, he figured that he had to engage in litigation to get in and secure the timber, and he refused to do it. In fact, after submitting it to him and we discussed it

he left my office, and it was a question then of whether I would lose the deal, and it was equally important to me to sell the cutting contracts, time was running against the Company, so he left the office and we did not reach a settlement in spite of his offer."

Appellant himself concedes this fact:

"We were in a hurry to close it, Mr. Olson, because the time was so limited. Even then we only had three years and one half, and Mr. Nielson wanted to hold the property for six months so he could take a capital gain before he really made a resale, so that would only give three years to get out 67,000,000 feet of timber, so we were really in a hurry to close it if we were going to close it." (Tr., pp. 304-305.)

Time was also of the essence to the Trustee and, having concluded that the sale to Mr. Nielson was desirable from the standpoint of the Debtor, he accepted the offer as submitted. (Tr., p. 399.) Of course, the Trustee had no way of knowing that Appellant would attempt to use the Nielson transaction to assert a claim against the Debtor in a transaction which was to materialize many months later.

The Trustee presented the offer of Mr. and Mrs. Nielson to the District Court for approval, together with a petition which expressly pointed out that the Nielsons "were prepared to purchase said contracts for the sum of \$100,000, less the sum of \$5,000 to be paid to A. W. Wilson as a real estate commission when and if the transaction is consummated." (Tr., pp. 7-8.) Notice of a hearing on said petition was given to each creditor and stockholder, and, following such hearing, the District Court

approved the Nielson offer and authorized the sale. (Tr., pp. 17-18.) Accordingly, the District Court and all creditors and stockholders of the Debtor were given the opportunity to consider and pass upon the offer of Mr. and Mrs. Nielson *with full knowledge of the fact that said offer required the payment of \$5000 to Appellant.*

The claim upon which Appellant now seeks to recover was not even suggested to the Trustee, to the District Court or to any creditor or stockholder until long after the sale to Sugarman Lumber Company had been incorporated in the Trustee's Second Plan of Reorganization, approved by the Court, accepted by stockholders and creditors, confirmed by the Court and fully consummated. To say that Appellant's position in the Nielson transaction was the same as in the Sugarman transaction is not only absurd but completely ignores the basic right of stockholders and creditors to full disclosure of all claims and obligations incident to a plan of reorganization *at the time they pass upon such plan.*

Moreover, the evidence showed that (i) Appellant prepared the offer for the Nielsons on Appellant's letterhead; (ii) that he negotiated a loan for them in connection with the transaction; and (iii) that he obtained from them a written agreement to the effect that he had procured the contracts for them, that they would require the Debtor to pay his "costs" and that they would pay him a brokerage fee on the timber covered by the contracts as such timber was removed or sold. (Tr., pp. 92, 144-145, 305.) The foregoing and related evidence is consistent only with the conclusion that Appellant represented and acted on behalf of the Nielsons in this transac-

tion, not the Debtor or the Trustee, and the Court so found. (Tr., p. 92.)

b. Appellant's Alleged Relationship With the Trustee Subsequent to the Nielson Transaction Is Likewise Contrary to the Evidence and the Findings of the Trial Court.

Appellant endeavors to blend the Nielson transaction into the sale, more than eighteen months later, to Sugarman Lumber Company pursuant to the Trustee's Second Plan of Reorganization. He suggests that, as early as July, 1952, he was authorized to sell the Debtor's properties as a whole. This suggestion is directly contrary to the trial court's findings and the evidence.

During his trusteeship, of course, the Trustee was carrying out the mandate of Chapter X that he seek and develop a plan of reorganization of the Debtor. In pursuing this task he came in contact with a great number of persons in the timber business, including various timber brokers. Many people, including Appellant, called upon the Trustee and indicated to him that they were considering the development of a proposal for the reorganization of the Debtor. (Tr., pp. 93, 357, 407.) The Trustee, of course, encouraged the submission of all proposals and furnished all prospective proponents with information concerning the Debtor and its properties and permitted them to inspect such properties. (Tr., pp. 93, 407.) This was the clear responsibility of the Trustee under the Bankruptcy Act.

Two important facts characterize the position of the Trustee with respect to all prospective proponents of reorganization proposals, including Appellant, during the

period prior to July, 1953. As the trial court found (Tr., p. 93):

1. Prior to July, 1953, the Trustee was not interested in a sale of the Debtor's properties, but was endeavoring to develop a plan of reorganization which would preserve for the Debtor's stockholders their equity interest in such properties and the operation thereof, and the Trustee expressly and repeatedly notified Appellant and other prospective proponents of this fact.

2. The Trustee also expressly and repeatedly notified Appellant and other brokers that *neither the Trustee nor the Debtor would employ any broker or pay any commission in connection with any plan of reorganization*, and that if Appellant or any other broker endeavored to develop any plan he must represent and be compensated by the proponents of such plan.

The Trustee explained the type of reorganization plan he was endeavoring to develop during this period as follows:

"Well, a plan that would preserve the assets of the company and include the participation of the equity holders in whatever corporation was set up."
(Tr., p. 401.)

(This fact is also established by the Trustee's First Plan of Reorganization filed with the District Court in June, 1953, which was part of the record before the trial court and which included a description of the various plans and proposals considered by the Trustee during this period.)

It was not until July, 1953, when the Reconstruction Finance Corporation notified the Trustee that it would not approve the Trustee's pending First Plan of Reorganization, that the Trustee determined that it would be necessary to sell the assets of the Debtor. (Tr., pp. 92-93, 402-403.) (This, also, was established by the records of proceedings in connection with both the First and Second Plans of Reorganization of the Debtor.)

The position taken by the Trustee with respect to the payment of brokerage compensation is summarized in the following testimony of the Trustee (Tr., p. 357):

“A. Well, your Honor, Mr. Wilson was, so far as I was concerned in my official capacity, just another broker. I had a number of brokers coming in trying to sell the timber and develop a plan of reorganization, and they would talk about where they were to get their commissions. I instructed them, just as I kept instructing Mr. Wilson. Mr. Wilson, I didn't care to discourage him from bringing in someone provided that I could stand on my position and not pay him a brokerage fee, and at no time did I encourage him to think that I would pay him a brokerage fee.”

The Trustee's advice to Appellant in this respect appears throughout his testimony and was summarized by him as follows (Tr., p. 358):

“I told Mr. Wilson that I wanted to keep the property intact and that I was devoted to developing a plan of reorganization. *If he had any client or anyone interested that he could bring them in, but that he should not look to me or to Coastal for a commission. That he had to get his commission from the purchasers or the proponents of any proposition. I definitely, over and over again, stated that.*”

The motive of the Trustee in taking this position was explained by him as follows (Tr., p. 361) :

“* * * my insistence upon hammering home the idea to Mr. Wilson that I would not pay a commission was predicated upon that, that I wanted to preserve as much of the equities to the stockholders as possible * * *.”

Despite the Trustee's emphatic statements to Appellant, Appellant wrote five letters to the Trustee between April 3, 1953 and July 17, 1953, suggesting that Appellant was endeavoring to develop a sale of the Debtor's properties. (Tr., pp. 370, 377, 404.) The Trustee became concerned over Appellant's disregard of his instructions and determined that such instructions should be again repeated in a letter to Appellant. As the Trustee testified (Tr., p. 370) :

“It had seemed to be a build-up that he was representing me and that he was serving me and that he was interested in bringing someone in to purchase the property. So at that time, following the receipt of several of these letters, that included, why, I discussed it with Mr. Olson and Mr. Harrington, and told him of my concern over it, and as a result of a meeting a letter was prepared that I sent to Mr. Wilson.”

(See also Tr., pp. 377, 404.)

The letter of the Trustee referred to in the foregoing testimony was delivered to Appellant on July 22, 1953 (Tr., pp. 310, 403), and stated, in part, as follows (Tr., p. 284) :

“The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge

Lemmon and I will receive and consider any proposals which you may desire to submit on behalf of your clients. Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act.'

Appellant, in his testimony, conceded that this letter stated in writing exactly what the Trustee had verbally and repeatedly stated to Appellant since Appellant's initial contact with the Trustee. Thus, Appellant was asked, and he responded as follows (Tr., p. 311):

"Q. He simply told you in this letter what he had previously on many occasions told you verbally?

"A. Yes, * * * ."

The Trustee's testimony is to the same effect:

"Q. Now, does that letter, Mr. Stevenot, state anything which you had not previously told Mr. Wilson verbally?

"A. No, it does not. I repeatedly stated the substance of this letter to Mr. Wilson for considerable time before sending this letter." (Tr., pp. 404-405.)

It is also significant that Appellant at no time asked the Trustee to employ him as an agent or broker (Tr., p. 401), and that Appellant at no time informed the Trustee that he expected to receive compensation from the Debtor until after the sale of the Debtor's assets had been consummated. (Tr., pp. 410-411, 413.)

c. Appellant Grossly Exaggerates the Part Which He Played in the Transaction With Sugarman Lumber Company.

Appellant's claim is based upon his alleged activities in connection with the sale of substantially all of the Debtor assets to Sugarman Lumber Company, consummated in April, 1954 as a part of the Trustee's Second Plan of Reorganization. Appellant, in his Opening Brief, claims full credit for this sale and would have this Court believe that it was his efforts and his efforts alone that produced this sale.

As summarized hereinabove the Trustee knew only that Appellant was in some manner associated with Mr. Steinberg and that Appellant was to be compensated by Mr. Steinberg for his efforts. There was testimony that Appellant aided Mr. Steinberg by introducing him to Mr. Holm, who was willing to repurchase some of the Debtor's assets from Mr. Steinberg's clients, and that Mr. Holm then produced other persons to repurchase other assets from such clients. These "behind the scenes" activities of Mr. Steinberg, Mr. Holm and Appellant apparently enabled Sugarman Lumber Company, the ultimate purchaser of the Debtor's assets, to submit and carry out the purchase of the assets from the Debtor. In view of this, the trial court concluded that the resale activities of Mr. Steinberg, Appellant and Mr. Holm were of indirect benefit to the Debtor's estate since they contributed to the ultimate sale of the Debtor's properties to Sugarman Lumber Company. It should be obvious from the foregoing, however, that Appellant's contact with such resales and with the sale to Sugarman Lumber Company, as a whole, was only a minor part, and that Appellant was

not, as assumed in his Opening Brief, responsible for and the procuring cause of the sale to Sugarman Lumber Company.

d. Appellant's Statement of the Case Completely Ignores the Fact That He Was Employed by and Represented the Prospective Purchasers of the Debtor's Assets.

Appellant's suggestion that he acted in the interests of the Debtor necessarily places him in the position of representing conflicting interests. It is respectfully submitted, however, that the evidence clearly establishes that Appellant did not represent the Trustee or the Debtor and represented only the prospective purchasers of the Debtor's assets.

In this connection the trial court found (Tr., pp. 95-96):

“9. On July 22, 1953, said Steinberg entered into an oral agreement with petitioner, which agreement was confirmed by said Steinberg by a letter to petitioner dated August 25, 1953, whereby said *Steinberg* agreed to pay petitioner \$25,000 for petitioner's services in bringing the Debtor to his attention. Petitioner has also entered into an agreement with Mr. Holm, one of the ultimate purchasers of a portion of the Debtor's properties, whereby said Holm is to receive a portion of any amount which petitioner might recover from the Debtor on the claim herein denied.”

The evidence on this aspect of this case is clear and convincing. On July 22, 1953, by his own testimony, Appellant procured from Mr. Steinberg an oral agreement to compensate Appellant, which was later reduced to writing. (Tr., pp. 288-289.) Both Appellant and Mr. Steinberg advised the Trustee that Appellant was being compensated

by Mr. Steinberg. (Tr., pp. 394, 406.) On August 25, 1953, Mr. Steinberg signed the written agreement, which was prepared by Appellant and which provided as follows (Tr., pp. 165, 183):

“August 25, 1953

Mr. Alex E. Wilson,
155 Montgomery Street, Suite 501,
San Francisco, California.

Dear Sir:

This is to acknowledge that *you brought to my attention the sale of the Coastal Plywood Company* and that I in turn brought it to the attention of N. N. Sugarman of Los Angeles who evidenced a great interest in purchasing the same.

When and if N. N. Sugarman or his associates purchase the Coastal Plywood Company they have agreed to compensate me reasonably.

Out of this compensation *I hereby agree to pay to Alex E. Wilson the sum of \$25,000* and to Redge Kuhen the sum of \$10,000.

Very truly yours,
/s/ William Steinberg.”

Appellant sought to soften the effect of this agreement by contending that the \$25,000 constituted mere reimbursement of his expenses. (Tr., p. 289.) This contention crumbled upon closer analysis and Appellant conceded that at least \$16,500 was simply an allowance for his “time”, i.e. compensation for his services. Appellant testified (Tr., pp. 337-338):

“A. Well, eleven months, I haven’t figured it up, but \$50.00 a day for 11 months would be \$1500 a month, wouldn’t it, ten months, it would be \$15,000, and it would be \$16,500 for 11 months. *That would*

be my—for my work, and then in addition to that I have automobile expenses, gas expenses, I entertain a great deal—you must entertain lumbermen, Mr. Olson. You don't go down to the Palace Hotel and sip a cup of tea, you entertain these men, and it takes money to do that.

Q. This \$50.00 a day is an allowance for your time?

A. That is my time. *My time is worth that, Mr. Olson.*”

At page 9 of Appellant's Opening Brief, the following statement is made:

“Appellant continued in his efforts to find a purchaser for these assets (Tr. 255-260), and estimates that *his actual time and expense in this regard were worth approximately \$20,000.* (Tr. 261.)”

In the light of this concession and in the light of his arrangement to receive \$5,000 more than this sum from Mr. Steinberg, Appellant demonstrates a complete disregard of right and reason in now seeking almost a quarter of a million dollars from the Debtor.

- e. **Appellant's Suggestion That the Trustee Prevented Any Possibility of Appellant Being Compensated by the Buyer Has No Support Whatsoever in the Record, and, in Fact, Is Directly Contrary to the Evidence.**

Appellant attempts to infer such prevention from the fact that the Trustee directly negotiated with Sugarman Lumber Company for the sale of the Debtor's assets. This, Appellant suggests, shows that the Trustee intentionally excluded Appellant from the negotiations.

It is significant that Appellant cites no direct evidence on this point. The evidence, of course, is clearly to the

contrary. As noted hereinabove, it is undisputed that the Trustee flatly and unequivocally stated to the Appellant at all times that neither the Trustee nor the Debtor would pay Appellant any compensation, and that Appellant must work for and be compensated by the proponents of any proposal with which he was associated. As the District Court found, the Trustee relied upon his understanding that Appellant was not representing the Trustee or the Debtor and would not receive any compensation from the Trustee or the Debtor. In fact, as the Trustee was expressly informed by Appellant and Mr. Steinberg in July, 1953, Appellant had followed the conditions laid down by the Trustee and had entered into a contract to receive compensation from the prospective purchasers.

The Trustee, of course, had no obligation or reason to inquire into the relationship between Appellant and Sugarman Lumber Company, and, in any event, the Trustee was certainly entitled to assume, on the basis of the advice to him that Appellant had a contractual arrangement with the prospective purchasers, that Appellant had adequately protected his position. That Appellant is now dissatisfied with his arrangement with the purchasers is certainly no responsibility of the Trustee.

f. Appellant Has Not Established That He Was Promised Compensation by One of the Trustee's Counsel.

In the course of his testimony, Appellant attributed certain statements to Sterling Carr, who was serving as one of the Trustee's counsel, and he now urges that such statements were equivalent to a promise of compensation by an agent of the Trustee. As noted hereinafter, any statements which may have been made to Appellant by

one of Trustee's counsel clearly cannot bind the Debtor's estate. At this point, however, we desire to point out that Appellant's testimony was obviously unreliable and not accepted by the trial court. In fact, Appellant's entire testimony was riddled with contradictions and exaggerations and the trial court would have been fully justified in completely disregarding such testimony.

First, however, let us examine the position of Mr. Carr. Mr. Carr has been for approximately 25 years, and still is, Appellant's attorney and close friend. (Tr., pp. 135, 338.) Mr. Carr, of course, has a very clear conflict of interest in this matter and has not participated herein.

It should be noted that Appellant at no time testified that Mr. Carr employed him as a broker or agreed to pay Appellant any compensation from the Debtor's estate. In fact, Mr. Steinberg was expressly advised by Mr. Carr that no commission or compensation would be paid to Appellant by the Debtor. (Tr., p. 194.) As Mr. Steinberg testified (Tr., p. 194):

“* * * Mr. Stevenot and you *and Mr. Carr* were very *emphatic* and *stated specifically* that *Mr. Wilson was not to receive any fees* or could not receive any fees.”

This statement was repeated to Appellant by Mr. Steinberg. (Tr., p. 194.) Also, Appellant responded “Yes, definitely” when asked: “*Mr. Carr* told you that the Trustee had no power to employ you?” (Tr., p. 307.) Could Appellant conceivably believe that Mr. Carr could employ him when he knew that the Trustee, Mr. Carr's principal, had no such power?

Moreover, Appellant admits that he at no time advised the Trustee of any of his alleged conversations with Mr. Carr. (Tr., pp. 308-309.) Mr. Carr at no time discussed Appellant or Appellant's activities with the Trustee and the Trustee had no knowledge of any conversations between Mr. Carr and Appellant. (Tr., pp. 383, 409-410, 416.)

Even if Mr. Carr had authorized Appellant to sell the Debtor's properties, there is no room for a contention that Appellant thereby became an agent of the Trustee or the Debtor or that Appellant is entitled to compensation from the Debtor. Mr. Carr was Appellant's very close friend and counsel. At the same time that the alleged conversations with Mr. Carr were taking place, the Trustee, Mr. Carr's principal, was stating emphatically and unequivocally to Appellant that no broker would be employed and no compensation paid. Thus, even if Mr. Carr had authorized Appellant to proceed with the sale of the Debtor's properties, how could it be contended that Appellant was entitled to rely on Mr. Carr, counsel for Appellant as well as for the Trustee, when Mr. Carr's principal expressly negatived any such authority.

ARGUMENT.

It is respectfully submitted that Appellant's appeal should be dismissed for the reason that he has failed to obtain the leave of this Honorable Court to prosecute his appeal, as required by statute and the applicable decisions of the Federal courts.

It is further respectfully submitted that, in any event, the judgment of the District Court denying Appellant's

claim must be affirmed for the following reasons, each of which is conclusive against the allowance of his claim:

(1) Under Chapter X of the Bankruptcy Act compensation may be allowed only to designated classes of parties; Appellant does not fall within any of such classes.

(2) Appellant was, at best, a volunteer and therefore may not recover compensation from the Debtor's estate even if the estate benefited from his activities.

(3) Even if Appellant had been employed by the Trustee, no allowance may be made to him since his employment was not authorized by the District Court.

(4) No compensation may be recovered where, as here, there was an understanding between Appellant and the Trustee that no commission would be charged.

(5) Compensation may not be allowed to Appellant because he represented conflicting interests.

(6) Appellant may not recover compensation herein because he was not employed by a written contract.

I.

APPELLANT'S APPEAL SHOULD BE DISMISSED.

A. Appellant Has Not Complied With the Requirement That Leave to Appeal Be Obtained in All Cases Involving Appeals From Orders Granting or Denying Allowances Under the Bankruptcy Act.

Appellant's appeal is taken under Section 250 of the Bankruptcy Act (11 U.S.C. Section 650), which provides:

“Appeals may be taken in matters of law or fact from orders making or refusing to make allowances

of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to *and allowed by* the court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.”*

As the United States Supreme Court ruled in *Dickinson Industrial Site v. Cowan*, 309 U.S. 382, 385, 60 S.Ct. 595, 597, 84 L.Ed. 819, 823:

“* * * appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals.”

The Supreme Court reviewed the legislative history of Section 250 and concluded that appeals from orders making or denying allowances could not be had as a matter of right but only after obtaining leave from the appellate court:

“The history of fees in corporate reorganizations contains many sordid chapters. One of the purposes of § 77B was to place those fees under more effective control. Buttressing that control was § 77B, sub.c(9) which, together with former § 24, sub.b, made appeals from compensation orders discretionary with the appellate court.

We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries, such as members of committees,

*Unless otherwise noted, all emphasis herein is added.

whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate. Allowance or disallowance involves an exercise of sound discretion by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. For certainly it seems sound policy to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the appellate court. To allow these appeals as a matter of right is to encourage an unseemly parade to the appellate courts and to add to the time and expense of administration. We will not resolve any ambiguities in favor of that alternative.”

(309 U.S. at pp. 388-389, 60 S.Ct. at p. 599, 84 L.Ed. at p. 825.)

This construction of the statute was reaffirmed by the Supreme Court in *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364:

“* * * In our view, however, Rule 73(a) is not applicable to appeals under § 250 (see 2 Collier on Bankruptcy, 14th Ed., p. 918) for they are permissive appeals which may be had not as of right but only in the discretion of the Circuit Court of Appeals. Since § 250 provides that they may ‘be taken to and allowed by the circuit court of appeals’, *the proper procedure for taking them is by filing in the Circuit Court of Appeals, within the time prescribed in § 25*

sub. a, applications for leave to appeal, not by filing notices of appeal in the District Court as was done here.’’

(311 U.S. at pp. 581-582, 61 S. Ct. at p. 333, 85 L. Ed. at p. 367.)

In that case, as here, the appellant had merely filed a notice of appeal and had not filed an application for leave to appeal. The Supreme Court observed:

“* * * The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient.’’

(311 U.S. at p. 582, 61 S. Ct. at p. 333, 85 L. Ed. at p. 367.)

The Supreme Court permitted the appeal in that particular case because the appeal had been taken before the Supreme Court had decided *Dickinson Industrial Site v. Cowan, supra*, and in reliance upon an earlier and contrary decision of the Circuit Court of Appeals for the Second Circuit in *London v. O’Dougherty*, 102 F. (2d) 524. As noted in the concurring opinion of Mr. Justice Reed:

“* * * However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London v. O’Dougherty*, 2 Cir., 102 F. 2d 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires. *Watts, Watts & Co. v. Unione Austriaca*, 248 U.S. 9, 21, 39 S. Ct. 1, 2, 63 L. Ed. 100, 3 A.L.R. 323; *Montgomery Ward & Co. v. Dun-*

can, 311 U.S. 243, 61 S. Ct. 189, 196, 85 L. Ed. 147, decided December 9, 1940. *In rare instances* such as the case at bar this power is appropriate for curing even jurisdictional defects. Cf. *Rorick v. Commissioners*, 307 U.S. 208, 213, 59 S. Ct. 808, 811, 83 L. Ed. 1242.”

(311 U.S. at p. 583, 61 S. Ct. at pp. 333-334, 85 L. Ed. at p. 368.)

Appellant in the present case has no excuse for his failure to obtain leave to appeal, since the required procedure has now been settled for approximately 16 years. See *In Re Country Club Bldg. Corporation*, 128 F. (2d) 36, 37, where the Court of Appeals for the Seventh Circuit referred to this procedure and stated:

“* * * That this provision, where applicable, must be complied with in order to confer jurisdiction, has been decisively adjudicated. *Dickinson Industrial Site v. Cowan*, 309 U.S. 382, 60 S. Ct. 595, 84 L. Ed. 819; *R.F.C. v. Prudence Securities Advisory Group*, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364.”

See also *In re Donahoe's, Inc.*, 110 F. (2d) 813, and *In re Von Kozlow Realty Co.*, 116 F. (2d) 673, where appeals taken by filing notices of appeal were dismissed for failure to make application for allowance of the appeals.

Although one Court of Appeals has suggested that an appellate court may have the power, based on *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, *supra*, to treat a notice of appeal as an informal substitute for an application for leave to appeal, the Court refused to exercise such power in the absence of “excep-

tional circumstances appearing in the record," or, more specifically, a "glaring error by the court below." *Cohen v. Casey*, 152 F. (2d) 610, 612.

B. Moreover, Appellant Has Shown No Error of the Trial Court Sufficient to Support an Application for Leave to Appeal.

In order to support an application for leave to appeal from an order disallowing compensation, an appellant must make a much stronger showing of error by the trial court than in the case of appeals generally. As stated by the Supreme Court in *Dickinson Industrial Site v. Cowan*, *supra*:

"* * * Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. * * *"

(309 U.S. at p. 389, 60 S.Ct. at p. 599, 84 L.Ed. at p. 825.)

The function of the trial court in passing upon allowances in reorganization proceedings is summarized in *In re Mt. Forest Fur Farms of America*, 157 F. (2d) 640, following an extensive review of the applicable statutes and decisions, as follows:

"Under the Act of Congress, a wide discretion is vested in the district court in the allowance or disallowance of fees, costs and expenses in reorganization proceedings. The orders of the district court in such matters will not be disturbed on appeal, unless there is shown to have been a clear abuse of discretion

manifesting a disregard of right and reason.” (Citing numerous decisions.)

(157 F. (2d) at pp. 647-648.)

Similarly, in *Milbank, Tweed & Hope v. McCue*, 111 F. (2d) 100, at page 101, the Court ruled:

“Mere participation in a reorganization proceeding does not create a right to compensation. The spirit of the Bankruptcy Act requires economy of administration and forbids the duplication of compensation for the same services rendered by different parties; and when conflicting claims are advanced, the decision of the District Judge must stand unless it is clearly erroneous.”

To the same effect see:

In re 32-36 North State St. Bldg. Corporation, 164 F. (2d) 205, 206;

Gochenour v. Cleveland Terminals Bldg. Co., 142 F. (2d) 991, 995;

In re Standard Gas & Electric Co., 106 F. (2d) 215, 216;

Abrams v. Cleveland Terminals Bldg. Co., 136 F. (2d) 537.

Clearly there has been no error of the trial court here which manifests “a disregard of right and reason.”

II.

UNDER CHAPTER X OF THE BANKRUPTCY ACT COMPENSATION MAY BE ALLOWED ONLY TO DESIGNATED CLASSES OF PARTIES; APPELLANT DOES NOT FALL WITHIN ANY OF SUCH CLASSES.

Appellant's claim was asserted under Sections 241 to 250 of the Bankruptcy Act (11 U.S.C. Sections 641-650). Sections 241, 242 and 243 set out the classes of parties who are entitled to receive compensation from a Debtor's estate. Section 241 permits allowance of compensation to the referee, any special master, the trustee and to counsel for the trustee, the debtor and the petitioning creditors. Section 243 authorizes the allowance of compensation to creditors and stockholders, and their respective counsel, for services in connection with the submission of suggestions or proposals for reorganization, or objections to the confirmation of a plan, or the administration of the estate. Obviously Appellant does not fall under either of these sections.

Appellant apparently bases his claim on Section 242 of the Bankruptcy Act (11 U.S.C. § 642), which provides as follows:

“§ 642. *Representatives and other parties in interest; attorneys therefor*

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

Appellant was not a creditor or stockholder of the Debtor and has never suggested that he at any time represented any creditors or stockholders. Accordingly, Appellant does not fall within any of the categories listed in the statute unless he can be considered a "party in interest" or an "agent" for a party in interest.

It has been squarely held that the term "parties in interest," as used in Section 242, includes only creditors and stockholders who are *not* represented by a committee or other representative. Thus, in *In re Paramount-Public Corporation*, 12 F. Supp. 823, at page 827, it was held:

"* * * the words 'parties in interest' plainly refer to creditors, stockholders, or other persons having claims against, or interests in, the company or its property, other than those represented by 'committees or other representatives of creditors or stockholders.' "

To the same effect, see:

In re Panhandle Producing & Refining Co., 25 F. Supp. 907, 911;

In re South State Street Bldg. Corporation, 140 F. (2d) 363, 366.

Since Appellant obviously was not a "party in interest," and obviously was not an "agent" thereof, the applicable statutes do not authorize any allowance whatsoever to Appellant. It has been squarely held that a court has no jurisdiction to allow any compensation to any person unless such person falls within one of the categories specified in the statutory provisions. See *Cooke v. Bowersack*, 122 F. (2d) 977, 981, where it was said:

"The right of the appellees to an allowance is determined by 11 U.S.C.A. §§ 642 and 643, as amended by the Chandler Act and as interpreted by the decisions * * *."

The *Cooke* Court further ruled that since the statute "limits the power of the court in making allowances," the burden is on applicants for allowances "to show that their services were of the kind made compensable by the statute." (122 F. (2d) at pp. 981-982.)

In *In re Panhandle Producing & Refining Co.*, 25 F. Supp. 907, 911, compensation was denied an agent who negotiated an underwriting of securities to be issued under a reorganization plan squarely on the ground that the agent did not fall within any of the classes designated in the statutes. See also *Le Boeuf v. Austrian*, 240 F. (2d) 546, 553; *Teasdale v. Sefton Nat. Fibre Can Co.*, 85 F. (2d) 379, 382.

III.

APPELLANT WAS, AT BEST, A VOLUNTEER AND, UNDER THE AUTHORITIES, CANNOT RECOVER COMPENSATION FROM THE DEBTOR'S ESTATE EVEN IF THE ESTATE BENEFITED FROM HIS ACTIVITIES.

Appellant takes the position that the sole condition to an allowance of compensation to Appellant is benefit to the estate. This contention is not only completely unsupported by the authorities but is directly contrary thereto. The evidence herein clearly demonstrates that Appellant was nothing more than a volunteer. Appellant not only acted without authority, he acted in the face of the Trustee's repeated notices that neither the Trustee nor the Debtor would employ or compensate Appellant. In fact, Appellant made a contractual arrangement to receive his compensation from the representative of the prospective purchasers, Mr. Steinberg. As the District Court ruled (Tr., p. 88):

“* * * petitioner by his admitted attempts to secure his commission from the buyer, shows that he performed services for the estate as a volunteer, and not in reliance upon the duty of the estate to pay for the reasonable value of the services rendered.”

Accordingly, in so far as the Trustee and the Debtor are concerned, Appellant was clearly a volunteer within the rule laid down by the following cases, and is not entitled to any allowance herein:

Newport v. Sampsell, 233 F. (2d) 944;

In re Porto Rican American Tobacco Co., 117 F. (2d) 599, 602;

Gold v. South Side Trust Co., 179 Fed. 210, 213, cert. den., 218 U.S. 671, 31 S.Ct. 221;

In re Mt. Forest Fur Farms of America, 62 F. Supp. 59, 70, aff'd. 157 F. (2d) 640;

In re Prudence Bonds Corporation, 122 F. (2d) 258, 263.

Thomas v. Peyser, 118 F. (2d) 369, 372;

In re Munson S.S. Lines, 120 F. (2d) 794.

The applicable rule is stated in *In re Porto Rican American Tobacco Co.* as follows:

“This court has held both under the old Bankruptcy Act and under section 77B that *a volunteer, even if his services have benefited the estate cannot be compensated* out of the estate for services which should have been performed by the trustee or his attorney, unless the volunteer is authorized by the court in advance of rendering the service. * * * There is no reason for a different rule under Chapter X.”

(117 F. (2d) at p. 602.)

The decision of the Court of Appeals for the Third Circuit in *Gold v. South Side Trust Co.*, *supra*, is squarely applicable here. The petitioner in that action was a real estate broker who had been invited and encouraged by a trustee in bankruptcy to sell certain property, with the warning, however, that no commission would be paid. The Court refused to grant any allowance, stating:

“* * * He was not only a volunteer, *but a volunteer with warning*. If under such circumstances he had a right to collect for his services, or the bankrupt court should allow them, we can well see a dangerous precedent might be set.”

(179 Fed. at p. 213.)

Appellant in the present case also clearly was a volunteer with full warning that he must seek his compensation from the buyer.

The historical background of this rule is reviewed in *In re Mt. Forest Fur Farms of America*, 157 F. (2d) 640. As the Court there noted, the provisions of Chapter X relating to fees were designed to correct gross abuses in the allowance of such fees, and the courts have always refused to allow any compensation to volunteers. (157 F. (2d) at pp. 645, 646.)

In *In re Prudence Bonds Corporation*, *supra*, compensation was denied a volunteer even though he had been paid fees in connection with other plans of the debtor. As the Court ruled:

“This does not estop the district court or this court from considering the present application on its merits.”

(122 F. (2d) at p. 263.)

Appellant's suggestion that benefit alone establishes his right to recover is also refuted by *Milbank, Tweed & Hope v. McCue*, 111 F. (2d) 100, 101, where the Court ruled:

“Mere participation in a reorganization proceeding does not create a right to compensation.”

See also *Teasdale v. Sefton Nat. Fibre Can Co.*, 85 F. (2d) 379, 382:

“It is important to bear in mind that the statute does not require the payment of compensation to every one whose efforts may redound to the benefit of the reorganized company.”

The "volunteer" rule was recently recognized and applied by the Court of Appeals for the Ninth Circuit in *Newport v. Sampsell, supra*. In that case it appeared that the claimant had been employed for a time by a trustee pursuant to specific court authorization. The trustee notified the claimant that his services were terminated as of December 1, 1943, but claimant nevertheless continued to perform services and sought an allowance of compensation for such services. In this connection, he contended that he had been misled by the trustee. This Court affirmed the disallowance of compensation, stating:

"The referee may have intended to find as a matter of fact that F. P. Newport's continued attention to the affairs of the bankrupt was that of a volunteer. However, the express finding on the point seems more in the nature of a conclusion of law. If Newport was not as a matter of fact a volunteer, (if fact finding were in our purview, we would hold him a volunteer) we think he must be held to be *a volunteer as a matter of law*.

"Newport relies heavily on estoppel. He says that the trustee misled him. He acted in reliance thereon to his detriment. Through *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, he would import the California law of estoppel. *But the difficulty is that the trustee draws his power from the roots of the Bankruptcy Act. His powers are limited.* 11 U.S.C.A. § 75. *It is not for him to estop an estate, and thereby creditors, out of a substantial part of its assets.*"

(233 F. (2d) at p. 946.)

IV.

EVEN IF APPELLANT HAD BEEN EMPLOYED BY THE TRUSTEE, NO ALLOWANCE MAY BE MADE TO HIM SINCE HIS EMPLOYMENT WAS NOT AUTHORIZED BY THE DISTRICT COURT.

As this Court stated in *Newport v. Sampsell*, *supra*:

“* * * It is well settled bankruptcy law that on important decisions, whatever their character, *the trustee must get the court's approval* (or that of its delegate, the referee).”

(233 F. (2d) at p. 946.)

This Court was there speaking of a claim by a volunteer for an amount substantially less than is here involved.

In re Grim, 35 F. Supp. 15, is also squarely applicable here. The Court there was also faced with an application for a real estate broker's commission. The broker had actually been employed by the bankrupt, but the Court denied any allowance because such employment and the amount of compensation had not been approved by the Court prior to the sale. In this connection, the Court ruled (35 F. Supp. at p. 17):

“... the petition for the Order of Sale ought to have apprised the Court specifically of the claim for brokerage commission. It is to be noted that General Order 45, 11 U.S.C.A. following section 53, provides: ‘No auctioneer * * * shall be employed by a receiver, trustee or debtor in possession except upon an order of *the court expressly fixing the amount of the compensation or the rate or measure thereof.* * * *’ Although the foregoing relates to public sales, no reason appears why private real estate brokers should constitute a more favored class. The policy of law underlying General Order 45 would seem equally

applicable to the circumstances existing in the present case.

* * *

“A contrary conclusion would set a dangerous precedent in enabling brokers to charge the proceeds of a sale with claims for services rendered without notice to the Court or the lien creditors. It is clear that such a result cannot be sanctioned by this Court.”

General Order 45 is made applicable to reorganization proceedings by General Order 52.

Similarly, in *In re Equitable Office Building Corporation* 83 F. Supp. 531, two brokerage firms endeavored to recover an allowance for finding a lender who made a secured loan to a debtor in reorganization proceedings. It was held (83 F. Supp. at p. 580):

“Whatever may have been petitioners’ relationship to Mr. Hilson of Wertheim and Company, it was in no wise binding upon the trustee, and so far as their relationship with the trustee is concerned it is to be borne in mind that *Mr. Duncan [trustee], without the express sanction of the court, was without authority to obligate this estate for the payment of brokerage fees.* This is a circumstance concerning which petitioners were either aware, or should have known. If they expected to be paid the brokerage commission now claimed, they should, at the outset, have clarified their status, and asked that it be approved by the court. Their failure to take these steps can not now be disregarded. The court was not advised that petitioners would here seek compensation until long after it had been given approval to the new mortgage, and had done so upon the understanding that no brokerage fee was involved. Otherwise the parties in interest

would have been heard upon the question as to whether, in view of the brokerage claim, the mortgage should be accepted.”

The Court disallowed the entire claim of the two brokerage firms. The fact that the Court subsequently allowed \$10,000 to an individual involved in the same transaction does not represent a departure from this rule. This allowance was made with the approval of the Trustee for services when “time was of the essence” and there obviously was not time to obtain prior court authorization. Appellant cannot contend that he did not have time to have his status clarified by the District Court.

The purpose of this rule is obvious. Stockholders and creditors are clearly entitled to be heard in advance on the question of compensation to brokers employed by the Trustee. As stated in *In re Grim, supra* (35 F.Supp. at p. 17):

“A contrary conclusion would set a dangerous precedent in enabling brokers to charge the proceeds of a sale with claims for services rendered *without notice to the Court or the lien creditors*. It is clear that such a result cannot be sanctioned by this Court.”

And in *In re Equitable Office Building Corporation, supra* (83 F.Supp. at p. 580), the Court pointed out:

“Otherwise the parties in interest would have been heard upon the question as to whether, *in view of the brokerage claim*, the mortgage should be accepted.”

Neither the District Court, nor the Trustee, nor the creditors and stockholders of the Debtor had any warning that Appellant would seek a commission on the sale in-

cluded as part of the Second Plan of Reorganization when they gave their required approvals of said Plan, and the Trustee consummated the sale. Contrast this with the fact that the sale of cutting contracts to the Nielsons in 1952 was not made until after the proposed payment of \$5,000 to Appellant had been fully disclosed to the District Court and all parties, and all parties had been afforded an opportunity to object to such sale and payment at a duly noticed hearing.

Appellant endeavors to brush aside the foregoing rule by a reference to *Berman v. Palmetto Apartments Corporation*, 153 F. (2d) 192. However, it cannot be maintained that the *Berman* case in any manner relaxes this requirement of prior notice to the Court and creditors. In the *Berman* case, notice of the proposed sale *and the proposed commission* had been given to stockholders and creditors. (153 F. (2d) at p. 193.) This notice expressly stated that the claiming broker was to receive a commission "equal to 75% of the schedule of commissions, as established by the Detroit Real Estate Board," and further recited: "*This commission will be in the sum of \$6,000.*" In fact, the claimant in the *Berman* case was expressly employed by the trustees under an agreement which fixed the amount of his compensation at \$6,000. In view of the foregoing and other distinguishing factors noted in Part VIII hereof, it is obvious that the *Berman* Court was not overriding the requirement of prior application to the Court, including notice to creditors and stockholders, established by the decisions discussed above.

V.

NO COMPENSATION MAY BE RECOVERED WHERE, AS HERE, THERE WAS AN UNDERSTANDING BETWEEN APPELLANT AND THE TRUSTEE THAT NO COMMISSION WOULD BE CHARGED.

It is significant that Appellant "understood" and acquiesced in the Trustee's repeated statements to him that neither the Trustee nor the Debtor would employ any broker or pay any commission, and that if Appellant endeavored to develop a plan of reorganization he must act for and be compensated by the proponents of such Plan. (Tr., pp. 347, 401, 411.) Appellant voiced no objection to the Trustee's letter to the same effect. (Tr., pp. 94, 405-406.) In fact, Appellant expressly informed the Trustee that Appellant was being compensated by Mr. Steinberg. (Tr., pp. 394, 406.) Add to this the fact that Appellant never intimated to the Trustee, to the Court or to the Debtor that he expected compensation from the Debtor (Tr., pp. 97-98, 410-411), and how can it possibly be said that there was not an understanding that no compensation would be charged the Debtor? The Trustee clearly was entitled to and did rely upon such understanding. (Tr., p. 413.)

The conclusion in *Henry v. Craigie & Co.*, 273 Fed. 926, 927, is squarely applicable here:

"Considered as a whole, we are clear the rulings not only fail to show a situation where an agreement to pay commissions could be implied, but they expressly show that the understanding and agreement of both parties was that no commissions were to be paid."

VI.

**COMPENSATION MAY NOT BE ALLOWED TO APPELLANT
BECAUSE HE REPRESENTED CONFLICTING INTERESTS.**

As hereinabove noted, Appellant acted for, and obtained an agreement that he would be compensated by, the representative of the prospective purchasers, Mr. William Steinberg. Moreover, the evidence showed, and the District Court found, that Appellant entered into an agreement with Mr. Fred Holm, whereunder Mr. Holm is entitled to a portion of any compensation which Appellant may have received or may receive, including any compensation which Appellant might recover herein. (Tr., pp. 95-96, 229, 233.) Mr. Holm testified that he would receive 50% of such compensation. (Tr., p. 233.) Appellant, in his testimony, attempted to soften this by denying that any commission would be divided equally and suggesting that Mr. Holm would receive only his "expenses." (Tr., pp. 281-282.) Appellant, of course, must take this position or lose his license as a real estate broker and be subject to fine. (Tr., p. 282.) However, Appellant's concept of "expenses" includes allowances for "time" i.e., *outright compensation*. (Tr., pp. 337-338.) In any event, Appellant concedes that Mr. Holm would share, to some extent, in any compensation which Appellant might recover from the Debtor.

Mr. Holm purchased from Sugarman Lumber Company a substantial block of timber, comprising approximately one-sixth of the total properties sold by the Debtor to Sugarman Lumber Company. (Tr., pp. 174, 200, 232-233.) That his interests conflict with those of the Debtor is all too obvious.

The relationship between a real estate broker and his principal, of course, is of a fiduciary nature and commands undivided loyalty from the broker. (See 8 Am. Jur., *Brokers*, Sections 85, 86, 87.) This obligation has been most strictly enforced in bankruptcy proceedings and where any conflict of interest has been evidenced, compensation has been denied.

The controlling legal principles applicable in reorganization proceedings were laid down by the United States Supreme Court in *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820, as follows:

“* * * Furthermore, ‘reasonable compensation for services rendered’ necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. *American United Mutual Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 61 S.Ct. 157, 85 L.Ed. 91, decided Nov. 25, 1940. *Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted.* Cf. *Jackson v. Smith*, 254 U.S. 586, 589, 41 S.Ct. 200, 201, 65 L.Ed. 418. The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: ‘What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but *their tendency to evil in other cases.*’ *Weil v. Neary*, 278 U.S. 160, 173, 49 S.Ct. 144, 149, 73 L.Ed. 243. Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate

as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. *Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.*”

(312 U.S. at p. 268, 61 S.Ct. at p. 497, 85 L.Ed. at pp. 825-826.)

See also *Weil v. Neary*, 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243.

The decisions of the Supreme Court in this area were reviewed in *In re Mt. Forest Fur Farms of America*, 157 F. (2d) 640, 648-649, where the Court ruled:

“Some of the appellants who seek reversal of the orders of the district court disallowing their claims for fee and expense allowances rest chiefly upon the authority of *In re Memphis Street Ry. Co.*, 6 Cir., 86 F. (2d) 891, and the follow-up per curiam opinion in *Fuller v. Memphis Street Ry. Co.*, 6 Cir., 110 F. (2d) 577. These opinions are no longer authoritative, in view of the holding of the Supreme Court in *Woods v. City Nat. Bank Company*, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820, where the basic question concerned the power of the district court in proceedings under Chapter X of the Chandler Act, 52 Stat. 840, to disallow claims for compensation and reimbursement *on the ground that the claimant was serving dual or conflicting interests.* (Emphasis by the Court.)

(157 F. (2d) at p. 648.)

There are numerous decisions denying compensation because of conflicting interests represented by the claimant. See, e.g. *In re American Acoustics Inc.*, 97 F. Supp. 586 (attorney who represented creditors and later represented debtor denied compensation though no improper conduct shown); *Young v. Potts*, 161 F. (2d) 597 (stockholder dealing in securities of debtor); *In re Midland United Co.*, 159 F. (2d) 340 (attorney for a protective committee of senior securities and his wife purchased securities); *In re Midland United Co.*, 64 F. Supp. 399, 406 (two different members of same law firm unknowingly represented different stockholders' committees); *In re Mt. Forest Fur Farms of America*, 62 F. Supp. 59, 70, *affd.* 157 F. (2d) 640 (state court receiver represented public interests); *In re Ritz Carlton Restaurant & Hotel Co.*, 60 F. Supp. 861, 865-866 (bondholders' committee allied with indenture trustee); *Crites, Inc. v. Prudential Insurance Co.*, 134 F. (2d) 925, 928 (attorneys representing receiver and mortgagee); *In re Los Angeles Lumber Products Co.*, 37 F. Supp. 708 (attorney for the debtor purchased bonds of the debtor).

This rule is not limited to activities within the reorganization proceedings. As stated in *In re Equitable Office Building Corporation*, 83 F. Supp. 531, 567:

“Where petitioner represents opposing interests, either within the same reorganization, * * * or interests outside the reorganization opposing the interest represented in the reorganization, * * * there is a plain conflict of interests.”

In *Crites, Inc. v. Prudential Insurance Co.*, 134 F. (2d) 925, the parties who participated in the conflict of interest

also arranged for a splitting of fees. The Court stated (134 F. (2d) at p. 928):

“... It will be recalled that both attorneys represented the plaintiff in the foreclosure proceeding, and that Simkins had, on previous occasions, represented the Prudential. They had agreed among themselves that Simkins was to be appointed receiver and Harrison and Ingalls attorneys, and that they would pool their fees and divide them equally. In pursuance of the agreement Ingalls paid part of his fee to Simkins. Whether Harrison paid anything or participated in Simkins' fee, does not appear. *The Master found the fee-splitting arrangement reprehensible, and so do we.*”

All fee claimants are subject to this important limitation. As stated in *In re Los Angeles Lumber Products Co.*, 37 F. Supp. 708, 711:

“* * * Equity has long subjected to the closest scrutiny any act of a fiduciary which contained even the germ of a conflict between the interests of the beneficiaries and the self-interest of the fiduciary; and we believe no good purpose would be served by discussing here any distinction in responsibility among attorneys, directors, officers, formal trustees, etc.
* * *”

The historic conflict between a prospective buyer and a prospective seller requires no extended discussion here. See *London v. Snyder*, 163 F. (2d) 621, 626, where compensation was denied to attorneys for creditors who had submitted a bid for the debtor's properties. As the court observed:

“* * * necessarily the interest of counsel's clients, as bidders for the properties of the debtor, was to

acquire them on the best terms possible, and therefore in conflict with the interests of the debtor and its other creditors.”

(163 F. (2d) at p. 626.)

The conflicts of interest here presented are in fact far more reprehensible than those which led to disallowance of compensation in the decisions reviewed above. Appellant concedes that he acted for Mr. Steinberg, agent of the prospective purchasers. He concedes that a portion of his claim is for the benefit of Mr. Holm, one of the ultimate purchasers of the property. Appellant was thus very interested in promoting a sale on the best possible terms to the purchaser. In fact, Appellant, Mr. Holm and Mr. Steinberg constantly alluded in their testimony to a tremendous profit to Sugarman Lumber Company on the transaction. Obviously, Appellant's interests did not lie with the Debtor and the Trustee. *In any event, under the clear and unequivocal rule laid down by the United States Supreme Court, the mere existence of the conflict compels disallowance of Appellant's claim even if no unfairness is shown to have resulted.*

VII.

**APPELLANT MAY NOT RECOVER COMPENSATION HEREIN
BECAUSE HE WAS NOT EMPLOYED BY A WRITTEN
CONTRACT.**

The validity of claims in bankruptcy proceedings are determined by state law:

Bryant v. Swofford Bros. Dry Goods Company, 214
U.S. 279, 290-291, 29 S.Ct. 614, 618, 53 L.Ed.
997, 1002;

Vanston Bondholders Protective Com. v. Green, 329
U.S. 156, 170, 67 S.Ct. 237, 243, 91 L.Ed. 162.

As stated by Mr. Justice Frankfurter in the *Vanston* case:

“* * * And no obligation finds its way into a bankruptcy court unless by the law of the State where the acts constituting a transaction occur, the legal consequence of such a transaction is an obligation to pay.”

(329 U.S. at p. 170, 67 S.Ct. at p. 243, 91 L.Ed. at p. 170.)

Under California law, “An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission” is invalid unless in writing, and the agent or broker cannot recover compensation in the absence of a written agreement therefor.

California Code of Civil Procedure, Section 1973;

California Civil Code, Section 1624(5);

Estate of Horn, 102 Cal. App. (2d) 635, 228 P. (2d) 99;

Herzog v. Blatt, 80 Cal. App. (2d) 340, 180 P. (2d) 30.

Appellant, of course, had no written agreement. In fact, his verbal understanding with the Trustee was that Appellant would not represent or be compensated by the Debtor.

VIII.

NONE OF THE AUTHORITIES CITED BY APPELLANT SUPPORTS ANY ALLOWANCE OF COMPENSATION TO HIM.

Appellant's Opening Brief is devoted for the most part to an academic discussion of general principles of equity and the general law of implied and quasi contracts. It is obvious, of course, that such discussion cannot override the express limitations upon allowances prescribed in Sections 241 to 250 of the Bankruptcy Act and in the applicable decisions of the Federal courts. Moreover, as hereinafter discussed, such general principles do not support any allowance to Appellant herein.

It is significant that, with two exceptions clearly inapplicable here, every decision relating to allowances upon which Appellant relies involved an allowance to persons for whom compensation is expressly authorized by Sections 241 to 243 of the Bankruptcy Act. Thus In re Buildings Development Co., 98 F. (2d) 844, involved a bondholders' committee, which, as the Court noted, is included in the statute as one of the parties entitled to compensation. The same is true of In re Prudence Co., Inc., 93 F. (2d) 455 (committee representing creditors), In re A. Herz, Inc., 81 F. (2d) 511 (creditors' committees and their attorneys), and In re Irving-Austin Bldg. Corporation, 100 F. (2d) 574 (attorneys for bondholders).

Appellant relies heavily on *In re Irving-Austin Building Corporation, supra*, as holding that an allowance may be obtained upon a showing of benefit alone. However, Appellant completely ignores the fact that that case involved attorneys for bondholders, for whom compensation is expressly authorized by Section 642 of the Bankruptcy Act (11 U.S.C. Section 642.) Allowances to such attorneys had been made by the lower court and the Court of Appeals was concerned only with the question of whether the allowances were too high. In reviewing this question, the Court correctly observed that allowances to such authorized persons should be *measured*, i.e. the *amount* thereof should be determined, on the basis of benefit to the estate. In reaching this conclusion, the Court referred to the general doctrine of contract law that, in the absence of an express agreement as to the amount of compensation, such compensation may not exceed the benefits provided. The Court did not have before it, and did not purport to discuss, any allowance to an individual for whom compensation is not authorized by the Bankruptcy Act.

Appellant also relies on *Berman v. Palmetto Apartments Corporation*, 153 F. (2d) 192, and *In re Industrial Machine & Supply Co.*, 112 F. Supp. 261. The opinion in the *Berman* case indicates that the claimant had been expressly employed by the trustees to sell an apartment hotel owned by a debtor in reorganization. He obtained a purchaser of the hotel for \$250,000 and the trustees expressly agreed to pay him a commission of \$6,000. Thereupon, notice of the proposed sale was sent to creditors and stockholders, which notice *specifically described the brokerage commission*. Less than the required number

of creditors and stockholders objected, and the trustees, upon due notice to such creditors and stockholders, petitioned the Court for approval of the sale. The petition specifically referred to the brokerage commission. After a hearing on the petition the Court took the matter under advisement. Meanwhile, a third party submitted a higher bid and the purchasers were permitted to withdraw their offer and substitute a new offer of \$305,000, which contained no reference to the brokerage commission. The Court confirmed the sale at the higher bid. The Court allowed the broker \$6,000, stating that the offer and the raised bid "were phases of a continuing transaction which resulted in the sale * * *." (153 F.(2d) at p. 193.) The Court thus concluded that the original agreement to pay Berman \$6,000, of which notice had been given to the Court as well as creditors and stockholders, continued in existence, and that the only change was a raise in the offer. It was clearly shown that Berman was in fact employed by the trustees to find a purchaser of the apartment hotel and that he procured the sale and was promised compensation of \$6,000 for his services.

The *Berman* decision is readily distinguishable from the present case:

1. The *Berman* case involved an express and unequivocal employment of an agent by the trustees at an agreed and fixed commission. Berman was not a mere volunteer.

2. The *Berman* commission was fully disclosed to creditors and stockholders and in the petition to Court for approval of sale. A great majority of the

creditors and stockholders approved the sale with full knowledge of the commission.

3. Here there was not only no employment but an express negation of any employment by the Trustee, which was admitted and acquiesced in by Appellant.

4. Here there was an express understanding between Appellant and the Trustee that no commission would be paid.

5. Here, Appellant actually worked for and represented interests opposed to Trustee. No conflict of interest was presented in the *Berman* case.

6. Here, Appellant represented to the Trustee that he was being compensated by others and the Trustee relied on such representation.

7. No Statute of Frauds question was raised in *Berman*. It appears that the commission was specified in a written agreement.

The District Court had no difficulty in distinguishing the *Berman* case from Appellant's claim (Tr., p. 54):

"In the case at bar petitioner admits that the trustee warned him that the trustee would not pay him a commission; in contrast to this, the trustees in the *Berman* case agreed to pay a commission to the broker, and provided for the payment of a commission in a written notice of the proposed sale which was circulated to all the holders of the trust certificates of the bankrupt. More than two-thirds of the certificate holders approved the sale including

the provision for the broker's commission. This important difference makes the *Berman* case inapplicable to the case at bar."

Appellant's emphasis upon the Nielson transaction is nothing more than a futile attempt to bring his petition within the orbit of the *Berman* decision. As demonstrated hereinabove, the facts conclusively show that the Nielson transaction was completely unrelated to the sale to Sugarman Lumber Company approximately one and one-half years later. In any event, Appellant was not employed as a broker in the Nielson transaction but received his compensation pursuant to a condition inserted in the purchase contract by the Nielsons. Moreover, it has been squarely held that payment of compensation on one transaction does not create an estoppel and require compensation on a subsequent transaction in a reorganization proceeding. (*In re Prudence Bonds Corp.*, 122 F.(2d) 258, 263.) This Court itself has so ruled in the recent case of *Newport v. Sampsell*, 233 F.(2d) 944, 946.

The *Berman* case did not purport to inaugurate a new policy in reorganization cases amounting to a license to volunteering real estate brokers to obtain unwarranted compensation. It is a salutary comment that in the 11½ years since that decision was handed down it has never been cited in a subsequent case.

In re Industrial Machine & Supply Co., *supra*, involved an allowance of \$500 to a trustee's wife for clerical services. It cannot be seriously contended that this insignificant allowance, made for services which a regular

employee of the debtor might perform and apparently made without objection by any party, supports Appellant's claim herein. Obviously, the controlling policies underlying Sections 241 to 250 of the Act were not undermined to any material extent in that case.

Clearly, Appellant cannot rest upon an implied contract here. As the District Court ruled (Tr., pp. 84-85):

“The Court has found *and petitioner admits* that the trustee expressly declared that the estate would not pay petitioner a commission. This precludes the declaration of a contract by implication because it negatives conduct from which a contract could be implied as a matter of fact.”

Appellant's lengthy discussion of general equitable principles and quasi-contracts reduces itself essentially to a contention that the Trustee is estopped from challenging Appellant's claim. This contention must fail, even apart from the controlling principles discussed earlier in this brief, for two reasons:

- (1) Appellant has no equities in his favor; and
- (2) There can be no estoppel against the Debtor's estate.

A. The Equities Here All Rest With the Trustee and the Creditors and Stockholders of Debtor.

It is an established fact, as the District Court found, that Appellant engaged in his activities in the face of the flat and unequivocal warning, frequently repeated to Appellant by the Trustee, that neither the Debtor nor the Trustee would pay any compensation to Appellant and that Appellant must represent and be compensated by his

purchaser. It is also an established fact that Appellant did make an arrangement, by verbal and written contract with Mr. Steinberg, for the payment by Mr. Steinberg of Appellant's compensation *and that Appellant informed the Trustee of this arrangement.*

In this connection the following uncontradicted testimony of the Trustee is indicative of Appellant's conduct before the Trustee (Tr., pp. 410-411):

“Q. Now, did Mr. Wilson at any time prior to the close of the sale to Sugarman Lumber Company state to you that he expected to receive a commission from the debtor?

A. No, he did not.

Q. When did he first indicate to you that he expected to receive compensation from the debtor?

A. Well, in the latter part of May, I think about May 20th, I was having lunch at the Clift Hotel and Mr. Wilson approached my table to tell me he had decided—probably before that—just strike that. Will you repeat the question again?

Q. Yes. The question was this: When did Mr. Wilson first indicate to you that he expected to receive compensation from the debtor?

A. Well, I was true in my statement; on the 20th of May.

Q. (By the Court). Of what year?

Mr. Olson. And when was this?

A. In 1954. I was having lunch at the Clift Hotel and he approached my table to tell me that he had discussed with his attorney the matter of his having the right to claim a commission on the sale of the assets of the debtor company to Sugarman Lumber Company, and immediately I asked him, ‘This in spite of the fact I have repeatedly told you that neither I

nor the debtor company would pay you a commission, and that I had put you on written notice?’

He said, ‘Oh yes, *I will acknowledge all of that*, but in a matter of a reorganization where the Trustee is concerned there are cases that permit me to appeal to the Court for compensation.’

Q. Was anyone else present?

A. My Secretary, Miss Christenson was present.

Q. *Prior to the conversation of May 20th did you have any indication from any source whatsoever that Mr. Wilson expected to recover compensation from the debtor?*

A. No.’’

Thus Appellant gave no indication to the Trustee that he expected to receive compensation from the Debtor until May 20, 1954, after the sale of the Debtor’s assets had been irrevocably consummated. Only two inferences from Appellant’s conduct are possible, viz.:

- (a) That Appellant had no intention of claiming compensation from the Debtor prior to such time; or
- (b) That Appellant deliberately deceived the Trustee into believing that he expected no compensation from the Debtor.

Under either alternative, Appellant lacks the clean hands required of one who seeks relief in equity. See *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381, 1386:

“The guiding doctrine in this case is the equitable maxim that ‘he who comes into equity must come with clean hands.’ This maxim is far more than a mere

banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.”

Add to the foregoing the fact that Appellant bases his claim on activities in developing resales for Mr. Steinberg and his associates, i.e. *for the purchasers*, and it can only be concluded that Appellant acted, not in the interest of the Trustee or the Debtor’s estate, but solely for and on behalf of the purchasers.

Appellant cannot construct equity in his favor on the basis of statements to him by his own counsel, Mr. Carr. As noted hereinabove, Appellant’s testimony in this respect is flatly contradicted by the testimony of his own witness, Mr. Steinberg (Tr., p. 194).

Moreover, it is inconceivable that any statements by Mr. Carr could create an obligation on the part of the Debtor’s estate to compensate Appellant when, as Appellant concedes, the Trustee, Mr. Carr’s principal, was flatly and unequivocally stating that neither the Debtor nor the Trustee would pay compensation to Appellant. Even assuming that Mr. Carr had made the statements attributed to him, it is strange indeed that neither Appellant nor Mr. Carr made any mention of these conversations to the Trustee (Tr., pp. 378, 409-410). It is incredible that a man of Appellant’s experience would not have sought a clarification of his position if he expected compensation from the Debtor under these circumstances. Yet Appellant maintained his cloak of silence.

“Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person.”

(*Upton v. Tribilcock*, 91 U.S. 45, 55, 23 L.Ed. 203, 207.)

It is settled law that one who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry as to the nature and extent of the agent's authority, and must use due care to determine such authority (2 C.J.S., *Agency*, § 93, p. 1193). The primary source for determining the extent of an agent's authority is the principal. (*Southwestern Bell Telephone Co. v. Coughlin*, 40 F.(2d) 349, *cert. den.* 282 U.S. 848, 51 S.Ct. 27.) Where a person deals with an agent and has clear evidence of a limitation upon the agent's authority directly from the principal, he obviously cannot rely upon any contrary representations of the agent (*John A. Eck Co. v. Coachella Valley Onion Growers' Ass'n*, (102 Cal. App. 1, 9-10) 282 Pac. 408, 411).

Appellant had clear warning that no one, including Mr. Carr, had any authority to employ him. He received this warning directly from Mr. Carr's principal, the Trustee, who at all times flatly and unequivocally notified Appellant that he would not be permitted to represent or act for the Trustee or the Debtor. It is difficult to imagine a more striking instance where a third person was placed upon guard as to an agent's authority.

Aside from the foregoing, Appellant completely ignores the real equities in this matter, namely, those of the creditors and stockholders of the Debtor—and particularly

those of the stockholders, since it is from their pockets that any allowance to Appellant must come. The Second Plan of Reorganization of the Debtor offered such stockholders an opportunity to salvage a substantial portion of their investment. Appellant, without advance warning, now seeks to wipe out approximately one-third of this salvage and also to make both the creditors and the stockholders wait longer for their respective distributions.

As the District Court found from all of the evidence, including the entire record in the reorganization proceedings, the sale of the Debtor's assets to Sugarman Lumber Company was incorporated by the Trustee as part of his Second Plan of Reorganization of the Debtor, filed with the District Court on December 21, 1953. On January 7, 1954, the District Court entered its Order finding said Plan to be fair, equitable and feasible as required by the Bankruptcy Act (11 U.S.C. Section 574) and directed that it be submitted to the creditors and stockholders for their votes. The Plan was then accepted in writing by more than two-thirds of each class of creditors of the Debtor, and by more than a majority of the stockholders of the Debtor, all as required by the Bankruptcy Act (11 U.S.C. Section 579), and, on March 16, 1954, was confirmed by Order of the District Court. In said Order the District Court again found the Plan to be fair, equitable and feasible. On April 16, 1954, the Trustee, pursuant to said Order, conveyed the assets of the Debtor to Sugarman Lumber Company. *It was not until all of these steps had been irrevocably taken that Appellant made his claim known to the Trustee, to the Court and to the creditors and stockholders of the Debtor. Only*

after the District Court, the Trustee and the creditors and stockholders had irrevocably committed themselves did Appellant step forward and intimate that he expected an allowance. It seems obvious that the Plan would never have been approved by the Trustee, the Court or the stockholders as being fair and equitable if there had been any suggestion that the stockholders' recovery on their investment would be substantially less than the amount the Plan in terms offered to them.

In the light of these facts, it is respectfully submitted that Appellant's claim should insult, rather than appeal to, the conscience of the Court. Having misled the Trustee, the Court and the creditors and stockholders of the Debtor into believing that Appellant was receiving his compensation from the purchasers, it is impossible to find any equity whatsoever in Appellant's favor.

B. (In Any Event Neither the Trustee Nor His Counsel Can Estop the Debtor's Estate.

As this Court recently ruled in *Newport v. Sampsell*, 233 F. (2d) 944, 946:

“* * * But the difficulty is that the trustee draws his power from the roots of the Bankruptcy Act. His powers are limited. 11 U.S.C.A. 375. *It is not for him to estop an estate*, and thereby creditors, out of a substantial part of its assets. * * *”

Obviously, as the District Court ruled, if the Trustee may not estop the Debtor's estate, his counsel may not do so either.

CONCLUSION.

It is respectfully submitted that Appellant has shown no basis whatsoever for permitting this appeal or for reversing the judgment of the District Court. As we have demonstrated, denial of Appellant's claim is required by at least six separate and distinct legal principles, all based upon sound public policy and established by numerous decisions.

In this connection, it is obvious that there are many individuals who have "benefited" the Debtor's estate in the sense that, had they not been present, the reorganization of the Debtor might never have been accomplished—including all of the people who may have helped make it possible for Sugarman Lumber Company to purchase the Debtor's assets. If this were the test of allowance, bankrupt estates would indeed be at the mercy of such people as Appellant. The following quotation from *In re General Carpet Corporation*, 38 F. Supp. 200, 201 seems most appropriate here:

"During the gaudy 20's and the dazed 30's many of those who had dealings with bankrupt estates regarded them as 'happy hunting grounds.'

"The situation became so shocking that an aroused Congress enacted the Chandler Act in 1938. In plain and unmistakable terms the Chandler Act in Sections 241, 242 and 243, 11 U.S.C.A. §§ 641, 642, 643, erected safeguards against exploitation of bankrupt estates by the prospectors for gold, who appeared to regard them as privately staked out 'claims.'

"Despite the plain terms of the Chandler Act governing allowances to those connected with the administration of bankrupt estates, there still seem to be

some who seek to nullify the public policy enunciated by the Congress and who continue to regard bankrupt estates as 'grab bags.' "

Dated, San Francisco, California,

October 21, 1957.

Respectfully submitted,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Appellee.

No. 15,583

United States Court of Appeals
For the Ninth Circuit

ALEX E. WILSON,

Appellant,

VS.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a cor-
poration, Debtor,

Appellee.

Appeal from the United States District Court for
the Northern District of California,
Northern Division.

APPELLANT'S CLOSING BRIEF.

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No. 15,583

United States Court of Appeals For the Ninth Circuit

ALEX E. WILSON,

Appellant,

vs.

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a corporation, Debtor,

Appellee.

Appeal from the United States District Court for
the Northern District of California,
Northern Division.

APPELLANT'S CLOSING BRIEF.

STATEMENT OF THE CASE.

I. THE FACTS OF THIS CASE ARE NOT IN DISPUTE.

In the final analysis the facts of this case are quite simple. The evidence establishes the following salient facts without question:

(1) That Appellant was requested by the Trustee and his attorney, Sterling Carr, to find a purchaser for the assets of this estate;

(2) That these services were rendered by Appellant with the knowledge and acquiescence of the Trus-

tee and with the active assistance, encouragement and cooperation of the Trustee;

(3) That through the efforts of Appellant in negotiating the resales and thereby guaranteeing the investment of the Sugarman interests, an offer was made possible which was submitted to the Trustee and accepted by him and the Court;

(4) That the Sugarman interests were procured by Appellant as the purchaser of these assets, and that the assets of this estate were sold to them;

(5) That these assets were finally sold after direct negotiations between Sugarman Lumber Company and the Trustee from which Appellant was excluded, and that the Trustee thereby prevented any possibility that Appellant might have had to obtain his compensation from the purchaser;

(6) That the sale of these assets was of great benefit to this bankrupt estate.

The transcript show these facts contrary to any contention that may be made by the Trustee in his brief. Some of these facts are shown below by short excerpts from the Transcript, and some are discussed in more detail later in this brief.

Mr. Carr told Appellant that he would be paid (Tr. 273):

“A. He, (Mr. Carr) said, Stevenot is quite a decent fellow, and he won't do that in the final analysis; he is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good business man, *and he will pay you*”.

Petitioner procured the Sugarman as the purchaser of these assets (Tr. 419):

“Q. Mr. Hildebrand. But Mr. Wilson and Mr. Steinberg were the people that brought the Sugarman to you, weren’t they?

A. Mr. Stevenot. I am telling you, I don’t deny that”.

The Sugarman interests procured by Petitioner and the Sugarman Lumber Company are one and the same persons (Tr. 176-177):

“Q. Mr. McMurchie. It, (Sugarman Lumber Company) was formed for the purpose of taking over these assets?

A. Mr. Steinberg. That is right, taking over these assets.

Q. So that the original offer of July 22nd and the final purchasers are one and the same persons?

A. That is correct”.

Appellant was excluded from the negotiations between Sugarman Lumber Company and the Trustee (Tr. 407):

“Q. Mr. Olson. And how long did these negotiations continue (with Sugarman Lumber Company)?

A. For several weeks.

Q. Mr. Olson. Did Mr. Alex Wilson participate in these negotiations?

A. Mr. Stevenot. He did not”.

Again at page 320 of the transcript:

“A. Mr. Wilson. . . . After that, when the negotiations were going on they never called me into these meetings”.

This sale was of great benefit to the estate (Tr. 388):

“Q. The Court. You are willing to stipulate that it was a beneficial transaction to the estate?

A. Mr. Olson. I will stipulate, your Honor, that the second plan of reorganization which encompassed this sale was most beneficial to the estate”.

The findings of the Court are also quite clear in regard to the beneficial nature of Appellant's services. The findings of the Court in this regard appear in the Transcript at page 97:

12. Said sale of said assets and the efforts of Petitioner in interesting N. Sugarman, B. Margolis and others in the purchase of said assets and in introducing these interested parties to Trustee were of real benefit to the bankrupt estate.

13. Petitioner was instrumental in negotiating the resales by Sugarman Lumber Company, and Sugar Lumber Company would not have offered to purchase the assets of Debtor as aforesaid unless these resales had been negotiated by Petitioner.

Appellant contends that these services rendered at the special instance and request of the Trustee, freely accepted by the Trustee, and of great benefit to the bankrupt estate create an obligation to pay for these services which is recognized both at law and equity and in proceedings under the bankruptcy act. This obligation to pay for these services is even more apparent in this case in view of the long negotiations and many contacts between Appellant and the Trustee, all acquiesced in by the Trustee, and in view of

the prior conduct of the Trustee in the payment of a commission to Appellant in the Nielson transaction under almost identical circumstances, both of which created an even stronger and more equitable claim for compensation in this proceeding. This equitable claim arises under the law of implied in fact contract resulting from the conduct of the Trustee, and under the law of *quasi* contract imposed by the law irrespective of the intent of the parties when beneficial services are freely accepted as they were by the Trustee in this case. Appellant has demonstrated in his Opening Brief that the Bankruptcy Act authorizes the payment of compensation to Appellant for his services in this matter, and the applicable cases authorize the allowance of compensation to a real estate broker under almost identical circumstances.

II. APPELLEE'S INTERPRETATION OF THE FACTS IS DISPUTED.

The brief of Appellee does not seriously dispute any of the basic facts listed above, but merely attempts to minimize the effect of these facts. Similarly Appellee does not dispute Appellant's basic equitable claim for compensation, but attempts to raise numerous technical objections in an effort to avoid this equitable claim of Appellant.

Needless to say, Appellant does not agree with the Statement of Facts appearing in the Trustee's brief.

Appellant's analysis of the pertinent facts in this case has been presented in his Opening Brief. How-

ever, Appellant feels that some of the more apparent strained constructions and misconstructions of the evidence appearing in the brief of Appellee should receive some comment.

A. Trustee's Version of the Nielson Transaction Is Not in Accord With the Evidence.

Trustee goes to great lengths in attempting to distinguish the payment of a commission to Appellant for the sale of cutting contracts in the Nielson transaction under circumstances almost identical with the circumstances present in this case from the sale of the balance of the assets of Debtor which is now pending before this Court.

On page 13 of his brief Trustee attempts to import that in a letter of August 9, 1952, Mr. Clarence Nielson agreed to pay Appellant a commission and agreed to require the Debtor to pay Appellant his costs. A quotation from this letter which was Trustee's Exhibit "D" shows that no such construction can be placed on his letter. The letter stated as follows:

"It is understood and agreed that Nielson is to pay Wilson nothing for his work in obtaining the said contracts for him. Wilson's costs in this matter shall be paid by Coastal Plywood Company. The \$1.00 per thousand that the said Wilson is to receive represents his commission in aiding the said Nielson in selling the timber on the said land when and if the said Nielson secures the said lands and timber".

It is obvious from this letter that the commission mentioned in this letter has absolutely nothing to do with the purchase of the cutting contracts from Coastal,

but refers only to the resale of this timber when and if Mr. Nielson secured these cutting contracts. When and if Mr. Nielson purchased these contracts and then resold them, Mr. Nielson, as the seller on such a resale, expected to pay the commission specified. However, it is obvious from the letter that Mr. Nielson wanted it clearly understood that he was not to be responsible for any commission on the sale of the contracts to him by Coastal, and that on that sale Mr. Wilson was to obtain his commission from the seller, Coastal Plywood Company.

The evidence is also clear that the Trustee asked Mr. Wilson to sell these cutting contracts in July, 1952. Mr. Wilson worked with various potential purchasers, including Mr. Clarence Nielson, until the Nielson offer of October, 1952, which was accepted by the Trustee. This is a period of three months that Appellant spent in attempting to find a purchaser for these contracts in accord with the request by the Trustee. There is no evidence that Appellant had a purchaser at the time he was requested to sell or that Appellant at that time had anything except numerous potential purchasers which is the stock in trade of any real estate broker.

Prior to the acceptance of this offer by Mr. Nielson, the Trustee had a conference in an attempt to induce the purchaser, Mr. Nielson, to increase his offer for the cutting contracts so that Debtor could realize the sum of \$100,000.00 net on these properties. Mr. Nielson refused to pay more than \$100,000.00 for these contracts, and would not pay a commission in addition

to the \$100,000.00 purchase price because he was the purchaser. It should be noted that the Trustee during this conference was interested in getting more money for these contracts, and not particularly in who paid the commission. The following testimony appears at pages 398-399 of the Transcript:

“A. Well, immediately I called his attention to the fact that his offer contained an item of \$5,000.00 commission to be paid to Wilson, and I protested it saying that I wanted a hundred thousand net for the property, for the cutting contracts.

Mr. Nielson reacted by telling me that he would only pay a hundred thousand dollars and he insisted that \$5,000.00 of it be paid to Mr. Wilson.

We had considerable discussion over the matter and did not reach a conclusion, and Mr. Nielson left my office.

I tried at that time to get Mr. Nielson to eliminate the question of the commission and pay me the hundred thousand dollars. He refused. I repeated that several times.”

Apparently the Trustee attempted by negotiations with the purchaser, Mr. Nielson, to avoid the payment of a commission by either party to the real estate broker on the sale of these cutting contracts; a device that he was more successful in accomplishing in the subsequent sale to Sugarman Lumber Company. However, Mr. Nielson knew that if this sale was consummated a commission would have to be paid, and he made it clear that he would not be responsible for this commission. In the final analysis when the purchaser

refused to pay the commission, Coastal Plywood and Timber Company did pay Mr. Wilson his real estate commission of \$5,000.00 for the sale of these cutting contracts. As in the transaction now before this Court, when the purchaser has refused to pay a commission, it is the seller who must pay if he desires to take advantage of the offer which has been procured by the broker.

The order of the Court approving the sale of these cutting contracts clearly authorizes the Trustee to pay a real estate broker's commission to A. W. Wilson (Tr. 18), and a commission was paid by the check of Debtor marked "Commission—Sale of Cutting Contracts, \$5,000.00". (Tr. 147.)

B. The Trustee Requested That Appellant Sell the Assets of This Estate, and Encouraged and Cooperated With Him in His Effort.

Many portions of the testimony reported in the Transcript are direct evidence that the Trustee did request and authorize Appellant to sell the assets of Debtor corporation. (Tr. 141; Tr. 251-254; Tr. 149; Tr. 270-272; Tr. 306.) In addition to this direct testimony, the transcript contains many instances of conduct on the part of the Trustee which are consistent only with the giving of authority to Appellant to sell these assets.

The record in this matter contains many references to conversations in regard to the payment of a real estate broker's commission most of which took place prior to July, 1953. It would seem apparent that conversations in regard to real estate broker's commis-

sions arise only when the sale of real estate is being discussed and the broker authorized to proceed with the sale. The fact that conversations in regard to the payment of a commission were had shows in itself that without any doubt the sale of the assets by Mr. Wilson was authorized and discussed many times between Mr. Wilson and Mr. Stevenot, and show that Mr. Stevenot was in fact vitally interested both before and after July, 1953 in obtaining a purchaser for these assets.

The evidence also shows that Appellant wrote at least five letters to the Trustee in addition to many phone calls and conversations in the Trustee's office in regard to the sale of these assets and the prospective purchasers that Appellant had contacted. (Tr. 263-270; Petitioner's Exhibits 8, 9, 10, 11 and 12.) All of these letters and most of these conversations were prior to July, 1953, and also show that the Trustee had requested and was most interested in the sale of these assets.

There is some mention in Trustee's Brief of his letter of July 22, 1953, to Appellant stating for the first time in writing that no commission would be paid Appellant. The Trustee neglects to note that this letter was written on the same date that the Trustee had received an offer from J. J. Sugarman Company for the purchase of the assets of this estate; an offer that had been procured by Appellant. (Tr. 373.) The Trustee also neglects to state that he and his attorneys had been informed in a discussion five days previously that the Sugarman interests would not pay a com-

mission to any one in regard to this transaction. (Tr. 179-180.) If ever a letter was written too late it is this letter of July 22, 1953 from the Trustee. It is obvious that the Trustee's letter was written only after he had the offer procured by Appellant in his hands, and with full knowledge that the buyers would not pay any commission to Appellant. Certainly if the Trustee under these circumstances intended to deal with the purchaser procured for him by Appellant at his request, then he assumed responsibility for the payment of his compensation.

C. Appellant Was the Procuring Cause of the Sale to Sugarman Lumber Company, and Was the Means of Bringing His Principal and the Purchaser Together.

The duty of a real estate agent in order to entitle himself to compensation is well stated in the case of *Berman v. Palmetto Apartments Corp.*, 153 Fed. (2d) 192, a case involving a real estate broker's commission in a reorganization proceedings. In that case the court stated as follows:

“It is generally held that a selling agent is entitled to compensation if his agency is the procuring cause of the sale, and when his communications with the purchaser have been the means of bringing the purchaser and his principal together, his right to compensation is complete. (Citing many cases.)”

In this case Appellant was the procuring cause of the sale, and was the means of bringing together the Debtor company as his principal, and Sugarman Lumber Company as purchaser. The Trustee admitted

from the stand that Mr. Wilson and Mr. Steinberg were the people that brought the Sugarmans to the Trustee. (Tr. 419.) Mr. Steinberg stated that the offer was made possible by the efforts of Mr. Wilson, and through Mr. Wilson's introduction of Mr. Holm into the picture. (Tr. 216-217.) The Sugarmans insisted that before an offer could be made to buy the assets of Debtor corporation that they be assured that this property could be resold. (Tr. 220.) This, Appellant, through Mr. Holm, was able to do, and thereby Appellant enabled this offer and eventual sale to be made.

D. Appellant Diligently Served Only the Trustee in His Effort to Find a Purchaser for These Assets as Requested by the Trustee.

Throughout this transaction Appellant worked for and in the best interests of the Trustee and the Debtor Estate. Many other brokers had apparently attempted to sell these assets, but were unsuccessful in doing so. (Tr. 357.) The Trustee testified that he told all these brokers that he would not pay a brokerage commission because he would not further impoverish the situation that the equity stockholders had in the property by imposing a real estate brokerage commission on them. (Tr. 359.) It is difficult to conceive how the equity stockholders could have possibly been in any more impoverished condition than to have their corporation in the midst of a reorganization proceedings with the R.F.C. threatening to foreclose. It was obvious that the only alternative was the sale of the property, and the discouragement of all attempts to sell the property by statements to brokers that they must

obtain their commission from the buyer played directly into the hands of R.F.C. and Bank of America. If the Trustee truly had the interests of the stockholders at heart he would have been most willing to pay a brokerage commission and thereby to encourage the obtaining of a sale which would pay all creditors and stockholders in full, such as was finally procured by Appellant.

It is clear that the principal factor which enabled Appellant to obtain for his principal an offer from the Sugarman interests was his assistance in negotiating the resale of these assets by Sugarman to various other persons. The Sugarman interests stated that the only way they could make a deal for the purchase of the assets of Coastal Plywood was to have commitments for the resale of the timber to compensate for their original investment. (Petitioner's Exhibit No. 5, Tr. 172.) Mr. Wilson was instrumental in arranging these resales. (Tr. 172; Tr. 216.) Mr. Wilson had previously suggested a piecemeal sale of these assets to the Trustee because there was a lot of timber to sell in one block. (Tr. 252.) However, the Trustee insisted that all of the property must be sold in one package because he didn't want to go before the Court for confirmation of the sale as each portion was sold. (Tr. 252; Tr. 282.) The assistance given by Mr. Wilson in arranging these resales did not constitute a conflict of interest, but showed devoted and diligent efforts to obtain an offer from the Sugarman interests for the purchase of the assets of his client, Coastal Plywood and Timber Co. (Tr. 281.)

It appears that when Mr. Steinberg was convinced that the Trustee would not voluntarily pay the commission due to Appellant on this sale, Mr. Steinberg agreed to compensate Mr. Wilson for his assistance in completing the resale of these assets. (Tr. 163; Tr. 165.) Mr. Steinberg was a joint venturer with the Sugarman interests and expected to realize a large profit on these resales. (Tr. 180.) This is entirely a separate situation and concerned only with these resales, and not with the sale to Sugarman Lumber Company by Coastal Plywood Company. It was never intended to be in lieu of a commission from Coastal Plywood Company. (Tr. 289; Tr. 213.) However, Mr. Steinberg has not been paid, and Mr. Wilson has received absolutely nothing from any one for his successful efforts in this matter. (Tr. 214-215.)

It is conceded by all parties concerned that Mr. Fred Holm, introduced to Mr. Steinberg by Mr. Wilson, was the primary force in bringing together the parties on this resale. (Tr. 175-176.) Mr. Wilson has agreed to compensate Mr. Holm for his expense in contacting the various parties, and in completing these resales which made it possible for Mr. Wilson to obtain an offer acceptable to his seller. (Tr. 281.) Again, no conflict of interest appears.

E. Trustee Prevented Any Possibility of Appellant Being Compensated by the Buyer.

The evidence is clear that Appellant was not included in the final negotiations for the sale of these assets. (Tr. 320; Tr. 407.) Appellee cites no evidence to the contrary. The facts are that Appellant did

bring the buyer and seller together, and that thereafter seller did negotiate with the buyer outside the presence of Appellant, without advising Appellant of the time and place of these meetings, and without inviting Appellant to attend.

If Trustee actually intended that Appellant obtain his compensation from the buyer as he has testified, then he would have refused to deal with Sugarman Lumber Company without Appellant being present or without some provision being made in his negotiations for the payment of compensation to Appellant. If the Trustee really thought that Appellant was the agent for Sugarman Lumber Company, then the final details of this sale should have been negotiated through, or at least in the presence of this agent.

Trustee did none of these things. Knowing that this purchaser had been procured by Appellant, the Trustee dealt directly with this purchaser outside of the presence of this broker, without discussion of his commission, and with the obvious purpose of leaving Appellant high and dry on the question of compensation. The Trustee had also attempted by negotiation with Mr. Clarence Nielson to eliminate the payment of a commission to Appellant by either party in that transaction. Mr. Nielson being an ethical man and realizing that brokers must be paid for their services, the Trustee was unsuccessful in his efforts to avoid compensation to Appellant in that case. It is submitted that in equity this Court should not allow a Trustee by this questionable procedure to avoid the clear obligation of this estate to pay reasonable com-

pensation for the services rendered by Appellant. It is important that this Court protect the bankrupt estate from excessive charges; it is equally important that officers of the Court in these bankruptcy proceedings be held to at least a standard of conduct required of other businessmen.

The Trustee cannot seriously contend that he thought Sugarman Lumber Company was paying Appellant for his services in this matter. The Trustee knew full well from the offers he had received and from his conversations with Sugarman Lumber Company that they refused to pay a commission to any one in this transaction. (Tr. 179-180; Tr. 159.)

F. Statements by Sterling Carr That Appellant Would Be Paid for His Services Are Undisputed.

The evidence is clear and undisputed that Mr. Sterling Carr, attorney for the Trustee, throughout this transaction continually assured Appellant that the Trustee was a decent fellow and would not cheat him in his brokerages; that the Trustee was a good businessman; and that if Appellant sold these assets he would be paid. (Tr. 273; Tr. 287). The Trustee told Appellant to try and get his compensation from the buyer, and Appellant said that he would try to do so but he didn't think it was possible. The attorney for the Trustee told him not to worry too much about what the Trustee said because the Trustee would not cheat him and that if he sold the assets he would be paid. When the offer procured by Appellant was received by the Trustee, the Trustee thereafter negotiated directly with these purchasers without any

attempt to protect Appellant in his commission, and sold these assets to the purchasers procured by Appellant without any provision for compensating Appellant. These circumstances must appeal to a Court of equity and the facts of this case should induce this Court in justice and good conscience to compensate Appellant reasonably for the benefit received by this estate through his efforts. The technical objections raised by the Trustee cannot overcome this equitable claim of Appellant.

ARGUMENT.

I. FAILURE TO OBTAIN LEAVE TO APPEAL IS NOT JURISDICTIONAL, BUT ONLY A PROCEDURAL IRREGULARITY WHICH MAY BE DISREGARDED BY THE COURT.

It is a legitimate inference from a reading of Section 250 and Section 24 of the Bankruptcy Act and Rule 33 of Rules of U. S. Court of Appeals, Ninth Circuit, that all appeals from decisions in bankruptcy proceedings involving sums in excess of \$500.00 may be appealed as of right to the Court of Appeals. Section 250 of the Bankruptcy Act provides that appeals may be taken from orders refusing to make allowances of compensation in the manner and within the time provided for appeals by the Act. Section 250 reads as follows:

Section 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, *in the manner and within*

the time provided for appeals by this Act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceedings, and shall be summarily heard upon the original papers.

This language of Section 250 would appear to indicate that Sections 24 and 25, the only other sections in the Bankruptcy Act concerning appeals, control the *manner and time* for taking an appeal.

It is well settled that under Section 24 of the 1938 Act the distinction between permissive appeals and matters appealable as of right were largely removed, and that all appeals from proceedings in bankruptcy are as of right, as distinguished from an appeal upon allowance by the Appellate Court, except in cases where the order or decree appealed from involves less than \$500.00. It is stated in 2 *Colliers on Bankruptcy*, 730, Section 22.11, as follows:

“It is evident that under the present Act the general rule is that an appeal from an order or decree entered in a ‘proceeding in bankruptcy’, either interlocutory or final, may be taken as of right, without any necessity for the securing of allowance from the Circuit Court of Appeals. The sole statutory exception to this rule is where the order, decree or judgment appealed from involves less than \$500.00; in such case the appeal lies only upon an allowance by the Appellate Court”.

Rule 33, of U. S. Court of Appeals, Ninth Circuit, entitled Bankruptcy Appeals, in discussing petitions

to this Court for leave to appeal refers to Section 24 (a) of the Bankruptcy Act and to decrees or judgments involving less than \$500.00. No mention is made therein of a requirement for a petition for leave to appeal under Section 250 of the Bankruptcy Act.

Appellant was familiar with these sections and authorities prior to the filing of his Notice of Appeal in the District Court, and a conscientious reading of Section 250 and Section 24 of the Act and Rule 33 of the U. S. Court of Appeals, Ninth Circuit, would not indicate a need to check the case interpretation of the statutory language of Section 250.

However, as Appellee points out in his brief, the Supreme Court has ruled in the case of *Dickenson Industrial Site v. Cowan*, 309 U.S. 382, 60 S. Ct. 595, 84 L. Ed. 819, that the proper procedure in the appeal from compensation orders under Section 250 is to petition the Court of Appeals for leave to appeal. Subsequent cases have made it clear, however, that the failure to file such application in the Court of Appeals for leave to appeal is not a jurisdictional defect, but only a procedural irregularity that may be disregarded by the Court in its discretion. In 6 *Colliers on Bankruptcy* (14th Ed.) 4596, it is stated as follows:

“But the defect is not considered jurisdictional in the sense that it deprives the Appellate Court of all power to allow the appeal. The Court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice, if the circum-

stances indicate that an unmerited hardship would otherwise be visited upon Appellant”.

In the case of *Reconstruction Finance Corp. v. Prudence Securities, Advisory Group*, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364, the Supreme Court, speaking through Justice Douglas, the same Justice that had written the Court’s opinion in the *Dickenson case* (*supra*), held that the failure to file application for leave to appeal is not jurisdictional in the sense that it deprives the Court of power to allow the appeal, and that the Court has discretion where the scope of review is not affected to disregard such an irregularity in the interests of substantial justice. The Court stated that where the effect of the procedural irregularity was not substantial, where the scope of review was not altered, and where there was no question of the good faith of petitioner, of dilatory tactics, or of frivolous appeals, it would be extremely hard to hold that petitioner was deprived of his right to a decision on the merits of his appeal.

In this case the Notice of Appeal, Statement of Points, and Designation of Record were promptly filed in the District Court; the Transcript of Record has been promptly printed; and all briefs have been filed without request for extension of time. This case involves a request for compensation for services rendered by a real estate broker which, based on the normal brokerage commission, involves a substantial sum of money. This case also presents substantial questions of law, of equity and of public policy as evidenced by the extensive briefs filed herein which

should be considered by this Court on their merits. This appeal has been prosecuted in good faith without any dilatory tactics, and is not a frivolous appeal. It is submitted that the Court should therefore exercise its discretion and consider this case on its merits by disregarding the procedural irregularity or by treating the Notice of Appeal in the District Court as an informal petition for leave to appeal which should be granted.

There are many cases which authorize the exercise of such discretion by the Court of Appeals in the circumstances presented by this case. In the case of *Ross v. Drybrough*, 152 Fed. (2d) 427, the Court of Appeals for the Second Circuit held that where Appellant Ross had filed a Notice of Appeal in the District Court within the time prescribed by Section 25 (a) it appeared from the Supreme Court's decision in *Reconstruction Finance v. Prudence Securities*, 311 U.S. 579, 61 S. Ct. 311, 85 L. Ed. 364, that in point of jurisdiction, *stricti juris*, that served as an application either to compel the Trustee to appeal, or, as an alternative, for leave to appeal in his name.

In the case of *Cohen v. Casey*, 152 Fed. (2d) 610, the Court of Appeals for the First Circuit felt that its exercise of discretion was not warranted by any circumstances appearing in the record of that case, but the Court stated that under the *Reconstruction Finance* case it had the power to allow the appeal by treating the Notice of Appeal filed by Appellant in the court below as an informal substitute for an application to the Court for leave to appeal.

In addition to the *Cohen* case the only other cases cited by Appellee for the proposition that appeals taken by filing Notice of Appeal should be dismissed for failure to make application for allowance of the appeal are *In re Country Club Bldg. Corp.*, 128 Fed. (2d) 36; *In re Donahoe's Inc.*, 110 Fed. (2d) 813 and *In re Von Kozlow Realty Co.*, 116 Fed. (2d) 673. (Appellee's Brief, page 34.) However, the case of *In re Country Club Bldg. Corp.*, 128 Fed. (2d) 36, involves a situation where neither a Petition nor a Notice of Appeal was filed, and the other two cases were decided prior to the Supreme Court decision in *Reconstruction Finance v. Prudence Securities*, (*supra*).

The case of *In re Country Club Building Corporation*, 128 Fed. (2d) 36, cited by Appellee, involved a situation where the Appellant neglected to file either a Notice of Appeal or a Petition for Allowance to Appeal within the 30 day period. The Court held that the filing of one of these documents was jurisdictional. In a later case of *In re Granada Apartments*, 155 Fed. (2d) 882, decided by the same Circuit Court, it was clearly held that the failure to procure permission to appeal is not jurisdictional where a Notice of Appeal has been filed. In the case of *In re Granada Apartments*, 155 Fed. (2d) 882, the Court of Appeals for the Seventh Circuit stated as follows where a Notice of Appeal had been filed by Appellant:

“However, if it be considered that the appeal, to be effective, should have been by permission of the Court, such defect is not a jurisdictional one in the sense that it deprives this Court of

power to allow the appeal, and we now allow it. The appeal was perfected within the time required by either method, and the scope of the review is in no manner affected. See *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364''.

It is clear that the case of *In re Country Club Building Corp.*, 128 Fed. (2d) 36, cited by Appellee is not in point in this proceeding where a Notice of Appeal was filed in the District Court within the required time.

The case of *In re Donahoe's Estate*, 110 Fed. (2d) 813, is also cited by Appellee. This case was decided by the Court on March 19, 1940, and prior to the Supreme Court decision in the *Reconstruction Finance Corporation* case which is dated January 6, 1941. The case is therefore not at all applicable because the subsequent Supreme Court decision in the *Reconstruction Finance Corporation* case held that failure to petition for allowance to appeal was not jurisdictional, but merely a procedural irregularity. Similarly, the case of *In re Von Kozlow Realty Co.*, 116 Fed. (2d) 673, the final case cited by Appellee, was decided on January 7, 1941, the day after the decision in the *Reconstruction Finance* case (*supra*), and on a petition for rehearing the Court in the *Von Kozlow* case (*supra*) acknowledge that by virtue of the Supreme Court decision in the *Reconstruction Finance* case the Court now had discretion to treat the filing of the Notice of Appeal in the District Court as sufficient.

In the case of *Brown v. Hammer*, 203 Fed. (2d) 239, an appeal was allowed by the Fourth Circuit in spite of the procedural irregularity of failing to petition the Court of Appeals for allowance of an appeal. In that case the Court of Appeals stated as follows:

“Appeal was taken within the time allowed by 11 U.S.C.A. Section 48, from the order making allowances to Edens and Hammer. Motion to dismiss the appeal has been made on the ground that the exclusive method of review was petition to this Court for allowance of appeal under 11 U.S.C.A. Section 650. We think, however, that under the circumstances here appearing we should ignore the irregularity in the interest of substantial justice and should treat the appeal taken as a petition filed for the allowance of an appeal. *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364”.

The Court of Appeals for the Ninth Circuit has also held that the failure to petition for allowance of an appeal is not jurisdictional, but merely a procedural irregularity. The case of *State of California, Department of Employment v. Fred S. Renauld & Co.* (January 12, 1950), 179 Fed. (2d) 605, involved a claim by the State of California for unemployment insurance contribution involving less than \$500.00. Appeal was taken by Notice of Appeal filed in the District Court. Under Section 24 (a) of the Bankruptcy Act when an order, decree or judgment involves less than \$500.00, an appeal therefrom may be taken only upon allowance of the Appellate Court. Appellant did not secure or petition for leave to

appeal. However, the Court was moved to consider the Notice of Appeal filed in the trial Court as an informal substitute for the application to the Court of Appeals even in this case involving less than \$500.00. The Court held that the appeal would be considered on its merits notwithstanding the failure of petitioner to apply for leave to appeal as required by the Bankruptcy Act. The Court stated as follows:

“Until *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 1941, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364, the tenor of the U. S. Supreme Court decisions in the matter of permissive appeals indicated lack of jurisdiction in the U. S. Circuit Court of Appeals (now U. S. Court of Appeals) to entertain an attempted appeal in the circumstances obtaining here (citing cases). In the *Reconstruction Finance Corp. (supra)*, it was said concerning a provision (Sec. 250) of the Bankruptcy Act similar in requiring allowance of appeal by the Appellate Court . . . Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a Notice of Appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the Court of power to allow the appeal. The Court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice . . . The failure to comply with statutory requirements . . . is not necessarily a jurisdictional defect”.

It is apparent from the cases cited that the failure of Appellant in this case to obtain leave to file an appeal is not a jurisdictional defect, and that this

Court may disregard this procedural irregularity and hear this appeal on its merits.

Appellant urges this Court to exercise its discretion in this regard in view of the exceptional circumstances presented in this case. This case presents to this Court questions which are vital to the administration of the Bankruptcy Act in this jurisdiction. The numerous questions presented by this appeal are detailed in the extensive briefs filed by both parties, and in the Statement of Points Which Appellant Intends to Rely on Appeal. (Tr. 103-109.) Some of the more important and critical questions raised by this appeal are the following:

(1) Is the law of implied in fact and quasi contract applicable in bankruptcy proceedings, and does the conduct of the Trustee in accepting beneficial services requested by the Trustee create an implied in fact or quasi contract which is binding upon the bankrupt estate?

(2) Would denial of compensation to Appellant in this case constitute unjust enrichment to the bankrupt estate at the expense of Appellant?

(3) Should the conduct of the Trustee and his attorney in previously paying a real estate brokers commission under identical circumstances and in assuring Appellant that he would be paid for his services in this transaction estop the bankrupt estate?

(4) As a matter of justice and equity should appellant be paid for his services when his services saved this corporation and when he put together

the sale which resulted in the creditors and stockholders being paid in full?

(5) Can a real estate broker who has been requested to render services in a reorganization proceeding and who has not acted officiously be considered a volunteer and denied any compensation on that ground?

(6) Is a real estate broker one of the classes of persons entitled to compensation under Section 241 to 250 of the Bankruptcy Act (11 U.S.C.A. Sections 641-650)?

(7) Is the California statute of frauds (Code of Civil Procedure Section 1973) and the California case law of finders contracts applicable in a bankruptcy proceeding?

(8) Does assistance in the negotiation of resales constitute a conflict of interest by a real estate broker representing seller where such resales were essential in order to obtain an offer from a prospective purchaser for his client's property?

(9) Should the clear equitable principles applied in the case of *Berman v. Palmetto Apartment Corp.*, 153 Fed. (2d) 192 resulting in an award of compensation to a real estate broker under a very similar factual situation be applied in this case?

It is submitted that under these circumstances the Court should proceed to determine this case on its merits. The cases are clear that the failure to file a petition for leave to appeal is not jurisdictional, and

that the Court may disregard the procedural irregularity or may consider the Notice of Appeal as an informal application for leave to appeal and grant this informal application. The appeal has been filed in good faith, and has been fully argued in the Briefs and is now before the Court for decision. The appeal is meritorious and presents important questions of law and equity affecting the administration of the Bankruptcy Act. Appellant is appealing to equity for reasonable compensation for services rendered which saved this corporation in these reorganization proceedings, and this equitable appeal should not be denied on such technical grounds. In the interest of substantial justice and to prevent unmerited hardship to Appellant the Court should exercise the discretion vested in it to determine the merits of this case. As is stated in Rule 61, *Federal Rules of Civil Procedure*:

“The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

II. APPELLANT PERFORMED SPECIALIZED SERVICES AS A REAL ESTATE BROKER AT THE REQUEST OF THE TRUSTEE, AND HE WAS NOT A VOLUNTEER.

The next contention of the Trustee is that Appellant is a volunteer, and is therefore not entitled to compensation from Debtor's estate.

A volunteer is generally considered to be a person who officiously confers a benefit upon another with-

out a request for his services and without any express or implied promise of remuneration. (Restatement of Restitution, Section 2 and Section 112.) There is no evidence in this case that Appellant was a volunteer. The evidence is that Appellant proceeded with the sale of these assets at the request of the Trustee and his attorney and with the full knowledge, cooperation and acquiescence of the Trustee. Appellant was instructed and authorized by the Trustee and his attorney to proceed with the sale of the assets of the Debtor corporation. Appellant had many conversations with the Trustee in regard to this sale, and made various oral and written reports to the Trustee at his request in regard to potential purchasers he had contacted. The conduct of the Trustee in this matter, the payment of a commission to Appellant under identical circumstances upon the sale of certain contracts to Mr. Nielson, and the services rendered by Appellant in procuring a purchaser for the balance of the assets who was accepted by the Trustee, all demonstrate authority to proceed and a justifiable belief by Appellant that he would be paid. When a purchaser was produced by Appellant, the Trustee, and all other parties in interest, accepted the purchaser and the benefit of Appellant's services; proposed a plan of reorganization based upon the sale of the assets to this purchaser; had the plan accepted by the Court, and thereby ratified and confirmed all that Appellant had done in the administration of this estate. All of these facts conclusively demonstrate that Appellant was not a mere volunteer in this matter.

It has been suggested that the term "volunteer" is used in bankruptcy to indicate persons whose assistance to the Trustee or the bankrupt estate result in a duplication of services and of claims for compensation. (3 *Colliers* 14th Ed. p. 1426.) This was the definition apparently used by the Court in the case of *Gold v. Southside Trust Co.*, 179 Fed. 210, which is heavily relied upon by the Trustee and which was cited by the District Court as authority for its decision. That case was decided in 1910 and involved a real estate broker who had been invited and encouraged by the Trustee in Bankruptcy to sell certain property with the warning that no commission would be paid by the bankrupt estate. The Lower Court in that case had refused to pay a commission on the grounds that bankrupt property is always for sale; that the sale of the property was the duty of the Trustee; and that the Trustee had no authority to employ assistance without prior Court authorization. The Circuit Court by a two to one decision affirmed the Lower Court stating that the broker "was not only a volunteer, but a volunteer with warning".

This decision of the Court in this *Gold* case is criticized in 3 *Colliers on Bankruptcy*, 14th Ed. 1462-1463, where it is stated that the better view is probably expressed in the dissenting opinion as follows:

"For obvious reasons sales by public auction are in theory the most desirable method of reducing a bankrupt estate to money. In practice, however, especially when the property has no ready market, a private sale through reliable and effi-

cient brokers or agents may be considerably more advantageous. Its extra cost frequently pays and Courts in appropriate cases should not allow themselves to be misled by the theoretical principle that a bankrupt estate is always for sale, and, therefore, needs nobody to assist the Trustee in detecting the highest bidders among potential purchasers. The case of *Gold v. Southside Trust Co.* offers a striking example . . . The Circuit Court of Appeals, however, held that the broker, thus selected by the Trustee, 'was not only a volunteer, but a volunteer with warning' because he had failed to apply to the Court for approval before rendering his services, although the Trustee had called his attention to the necessity of such approval. . . . The better view of this case is probably the dissenting opinion of Judge Archbald, who posits the problem under an aspect that continues to be of interest."

The opinion of Judge Archbald is particularly in point in this matter. A portion of his opinion is as follows:

"This is not, in my judgment, a matter of discretion. The petitioner has a valid claim against the bankrupt's estate for services performed as a duly licensed real estate broker, undertaken at the instance of the Trustee, by which the estate was materially benefited; and the Court was bound to recognize and allow it . . . If this was a case between individual parties, there would be no question as to liability; and the bankruptcy Court ought to be as ready and as much bound to recognize its obligations as an individual. *The petitioner was not a volunteer.* He acted by direct

solicitation, the Trustee seeking to avail itself of the facilities of the brokerage business in which he was engaged; and his efforts were most successful. . . .

“The reasons given by the Referee for rejecting the claim are far from satisfactory. He seems mainly to rely on the policy which he has adopted, and the rule which he has laid down in pursuance of it, by which he requires Trustees to get authority in advance when the assistance of brokers is desired in making sales of real estate. No doubt, the rule, as a rule, is a good one, and may properly be invoked to protect bankruptcy estates against inroads, to which they might otherwise be open. But judgment, after all, is to be exercised, and the rule is not to be applied indiscriminately to throw out claims of merit. A policy is not to be pursued as a hard and fast rule where it works injustice. It seems to be implied by the Referee that, as Trustees are the agents designated by the law to make sale of real estate, they are themselves to hunt up purchasers; but they are entitled to the assistance of counsel to guide them legally, and may employ an auctioneer to cry their sales without question; and why, then, may they not avail themselves in a proper case of the experience of real estate men to help dispose to advantage of the property? They certainly are not called upon to drum up bidders; and if they are not to be allowed to get such assistance, bankruptcy estates are likely to suffer, as would have been the case in this instance, rather than the opposite. Even, therefore, on the basis that the allowance of this claim is discretionary, the Referee has practically refused to exercise his judgment with regard to it,

disposing of it on immaterial issues, rather than a consideration of the merits”.

“To affirm this decree, in my judgment, would work an injustice in order to support a policy, and I therefore dissent from it”.

Appellant submits that the dissenting opinion of Judge Archbald in the *Gold* case presents the more realistic and the proper approach to this problem. It is apparent that the principles expressed in this dissenting opinion are the same principles that guided the Court in the allowance of a real estate commission to Mr. Berman under very similar circumstances in the more recent case of *Berman v. Palmetto Apartments Corp.*, 153 Fed. (2d) 192 (1946; C.C.A. 6 Michigan). It is the equitable principles expressed in this dissenting opinion and in the *Berman* case (*supra*) which Appellant submits should be followed by the Court in this case.

The specialized services rendered by Appellant in this matter are not services which should or could have been performed by the Trustee or his attorney. Appellant for many years has specialized in the sale of timber and timber lands. (Tr. 133.) Appellant for this additional reason should not be considered a volunteer.

The Trustee also cites in his brief the case *In re Prudence Bond Corporation*, 122 Fed. (2d) 258, in support of his contention that Appellant was a volunteer. It should be noted that this case holds that acts of a volunteer which were beneficial to the debtor's trustee may be validated by ratification, in which

case the party originally acting as the volunteer may be entitled to an allowance for his services. This is, of course, the situation in this case where the acceptance of the purchaser by the Trustee, and the acceptance of the services rendered by Appellant which were of great benefit to the estate, constitutes a ratification of these services.

III. PRIOR AUTHORIZATION IS NOT REQUIRED IN BANKRUPTCY PROCEEDINGS WHERE COMPENSATION IS BASED ON BENEFIT TO THE ESTATE.

This point has already been discussed and the cases cited in Appellant's Opening Brief, pages 57-59.

This question of prior authorization discussed by Trustee in his brief was also raised by the Respondent in the case of *Berman v. Palmetto Apartments Corp. supra*, 153 Fed. (2d) 192, and in that case this point was decided directly contrary to the contention of the Trustee in this matter. In the *Berman* case (*supra*) the Court had not authorized the agent to proceed, and had not fixed his compensation, and it was on this basis that the District Court refused the allowance of compensation. In reviewing this decision the Circuit Court states at page 193 of the reported case as follows:

"The District Court denied his petition altogether. The Court filed an opinion which contained a finding that there was no valid existing contract between Appellant and the Trustee for the payment of a commission to Appellant. Conceivably, this may be true because the contract

never had the sanction or approval of the Court, but we are not limited to the consideration of the strict legal rights of the parties. (Citing cases)."

"Appellant's case cuts deeper than this. The District Court was sitting in bankruptcy and under the Bankruptcy Act had equitable jurisdiction. . . . The original offer, the withdrawal of it, and the subsequent offer, confirmed by the Court, were phases of a continuing transaction which resulted in the sale and in which Appellant certainly had equitable if not legal right, since at the behest of the Trustee, and after diligent effort, he found a purchaser."

The Court in the *Berman* case refused to be bound by the strict legal construction of the District Court, and proceeded on equitable grounds to award an allowance for the reasonable value of services rendered which benefited the estate, in spite of the fact no prior authorization to proceed had been obtained from the Court. Similarly in many of the cases cited by Appellant, as well as in many of the cases cited by the Trustee, compensation was awarded to expert witnesses, analysts, consultants, real estate brokers and other agents who rendered services of benefit to the estate without any discussion or mention of prior authorization by the Court. (See *In re Building Development Co.*, 98 Fed. (2d) 844; *In re Industrial Machine & Supply Co.*, 112 Fed. Sup. 261.)

As an example, one of the cases cited by Trustee in support of his contention is the case of *In re Equitable Office Building Corporation*, 83 Fed. Sup. 531. This case holds the exact opposite of the

contention of the Trustee. The Court in that case, after pointing out that the real estate broker had no authority or approval of the Court to proceed, did actually award compensation to the broker in the sum of \$10,000.00 as the reasonable value of services rendered to the estate by the broker. The Court states at page 580 of the reported case, after refusing the broker his full commission:

“Nevertheless, it is possible that Mr. Langua, as has been suggested by Mr. Duncan, performed some services that tended to facilitate the final consummation of the mortgage transaction, and at a period when time was of the essence. Upon the assumption that this was the fact, I shall award him the sum of \$10,000.00”.

The Court in the *Equitable* case did award a reasonable compensation for services rendered by the broker in the administration of the estate after acknowledging and pointing out that the broker had no prior authorization or approval from the Court. Many of the other awards to consultants, experts and witnesses in this particular case are also worthy of note in supporting Appellant's position that prior authorization is not required by the cases where petitioner has rendered services of benefit to the estate.

IV. THERE IS NO EVIDENCE TO SUPPORT TRUSTEE'S CONTENTION THAT THERE WAS AN AGREEMENT THAT NO COMPENSATION WOULD BE PAID.

Appellant has already discussed under Statement of the Case II-B the facts of this case in regard to

the understanding between Appellant and the Trustee, and in regard to the Trustee's request that Appellant sell the assets of this estate. There is evidence that during the course of Appellant's negotiations with the Trustee for the sale of both the timber cutting contracts and the Garcia tract that the Trustee advised Appellant that he should obtain his compensation from the buyer, and that the estate would not be responsible for his commission. Appellant admits that conversations were held with the Trustee during this time in the course of which he was advised that he should look to the buyer for his commission. However Appellant stated during these same conversations that this was impossible; that the seller always paid the real estate commission and not the buyer; that he didn't think it was possible to get his commission from the buyer; but that he would try to do so. There was never any agreement between Appellant and the Trustee that Appellant would look to the buyer for his commission. (Tr. 137.) In spite of these conversations wherein Appellant told the Trustee that he didn't think it was possible to get his commission from the buyer, the Trustee continued to urge Appellant to sell these assets. (Tr. 273.) Appellant had been paid his commission by the bankrupt estate in the Nielson transaction after identical conversations in regards to commissions. (Tr. 272.) During this same period Sterling Carr, the attorney for the Trustee, told Appellant not to worry because he would be paid if he sold these assets. (Tr. 273.) After Appellant had procured a purchaser, the Trustee negotiated directly

with the purchaser outside of the presence of Appellant, without his knowledge, and without making any provisions for compensating Appellant. (Tr. 320; Tr. 407.) The Trustee thereby made it impossible for Appellant to obtain his compensation from the buyer as he had previously suggested. During all of this time the Trustee knew that the buyer did not intend to pay any commission or compensation to Appellant. (Tr. 179-180; 159.) It is clear under both the law of implied in fact contract and the law of quasi contract as discussed in Appellant's Opening Brief that under these circumstances an obligation to pay reasonable compensation for Appellant's services arises as a result of the acceptance of these beneficial services irrespective of any prior conversation that may have occurred between Appellant and the Trustee.

**V. THERE IS NO EVIDENCE THAT APPELLANT REPRESENTED
CONFLICTING INTERESTS.**

The facts in regard to the alleged conflict of interests are discussed under the Statement of the Case II-D above. It is clear from these facts that the principal factor which enabled the Appellant to obtain an offer for these assets from the Sugarman interests was his assistance in negotiating the resale of these assets by Sugarman to various other persons. Finding 13 in the Lower Court was as follows (Tr. 97):

“Petitioner was instrumental in negotiating the resale by Sugarman Lumber Company, and Sugarman Lumber Company would not have offered to purchase the assets of debtor as aforesaid un-

less these resales had been negotiated by petitioner''.

The Trustee now contends that these activities by Appellant constituted a conflict of interest. It is submitted, however, that the activities of the broker in endeavoring to place his potential purchaser in a position where an offer can be made do not constitute a conflict of interest, but represents diligent and conscientious effort on behalf of his client to obtain a purchaser for his property.

It is generally conceded that a broker necessarily must deal with both parties in the very nature of his business, and that his effort is to bring the parties together upon the terms outlined by the owner. (*Frank Meline Co. v. Klienberger*, 108 Cal.App. 600, 290 Pac. 1042.)

Appellant had suggested to the Trustee that the assets of this estate should be sold piecemeal as they were on the resale, but Appellant had been instructed by the Trustee that all of these assets must be sold at the same time for a total sum of approximately \$4,000,000.00. (Tr. 252; Tr. 254.) An offer could not have been obtained for the purchase of these assets without some assistance to a potential purchaser in arranging the financing necessary to consummate a sale of this size. Efforts of a broker in attempting to arrange financing for a potential purchaser do not constitute a conflict of interests. It has been held that even the loan of money by the broker to a purchaser in order for him to complete the transaction does not constitute a conflict of interests. In this case of *Moody*

v. Osborne, 120 Cal. App. (2d) 598, 261 Pac. (2d) 183, the Court stated that the source of the funds with which such payment was made was of no particular import so far as the seller was concerned. Similarly, in the case of *Hicks v. Wilson*, 197 Cal. 269, 240 Pac. 289, the Court stated as follows:

“It is common knowledge that real estate brokers make a practice of procuring necessary funds to complete a purchase of property in the sale of which they are interested, and that they receive and are entitled to receive compensation from the buyer for such service; but, as pointed out above, such service is quite distinct from those rendered to the seller in the sale of his property”.

VI. APPELLANT'S PETITION FOR COMPENSATION WAS MADE AT THE EARLIEST POSSIBLE TIME.

The Trustee in his brief attempts to make much of the fact that Appellant did not file his petition in this matter until after the sale to Sugarman Lumber Company had been completed and approved by the Court. It seems apparent that Appellant had no claim for compensation until the sale to his client had been completed and approved by the Court by its order of March 16, 1954. Appellant had no claim until the sale had been consummated by this order, and until the Trustee had wrongfully refused to pay or petition for a commission for his services rendered in procuring this purchaser to whom these assets were sold. It should be recalled that the final confirmation of this sale to Sugarman Lumber Company was most un-

certain until the last moment, and was attended by Temporary Restraining Orders and other motions by objecting shareholders. It seems difficult to see how Appellant could have asserted any claim in this reorganization proceeding any sooner than he did. His claim was filed as an administrative expense and set for hearing along with all other administrative expenses including the Trustee's fee and the various attorney's fees.

Appellant had also been advised by Mr. Sterling Carr, attorney for the Trustee, that he should go along exactly as he had been doing and not to say anything about his compensation. This statement by Mr. Carr appearing on page 287 of the Transcript stands uncontradicted and must be taken as completely true and accurate:

Mr. Carr said, "I was never so shocked in all my life, I can't believe it, I can't believe that this is true". He said, "Alex, you go along just exactly the way you are going, don't say anything about it because if Mr. Stevenot is going to treat you that way after you have raised all this money and sold this property, then the only thing you can do is seek refuge with the Court, because, after all, Mr. Stevenot hasn't any legal right to give you a contract, Mr. Stevenot hasn't any legal right to set your fee, and you go right along, because you have been honest in this thing, and you have worked hard, and we needed this money so badly, and when the deal is closed, if he still doesn't pay you and you sue for it you can feel perfectly safe that the Courts of this state will treat you justly."

VII. THE CALIFORNIA STATUTE OF FRAUD IS NOT APPLICABLE IN THIS BANKRUPTCY PROCEEDING.

This is not a suit to recover a real estate broker's commission which has been agreed upon in writing by the parties, but is a petition to recover the reasonable value of services which have been rendered to the Debtor's estate in a reorganization proceeding at the request of the Trustee. The recognized commission of real estate brokers on a sale of timber land is 5% of the total sales price. (Tr. 147; Tr. 332.) This evidence has been introduced to establish not any agreed price but as a basis for determining the reasonable value of these services rendered by Mr. Wilson in procuring a purchaser for the assets of Coastal Plywood Company.

This claim of Appellant arises out of the conduct of the administration of the Debtor's estate during the course of these reorganization proceedings. It is Appellant's contention that on such an application under Sections 241, 242 and 243 of the Bankruptcy Act there is no requirement that the request to render such services or the employment of the broker be in writing. The Trustee cites no applicable cases to the contrary.

It is submitted that the California Statute of Fraud has no application in a federal court proceeding under the Bankruptcy Act where the powers granted to the federal court are derived from the federal statutes. Even in diversity of citizenship cases the Statutes of Fraud has been held to be procedural in California. (11 *Cal. Jur.* (2d) 195; *Woolley v. Bishop*, 180 Fed.

(2d) 188), and therefore not applicable in such federal court proceedings. There is no requirement that the federal court apply procedural rules even in diversity of citizenship cases. The case at bar is not a diversity of citizenship case. This case arises under the Bankruptcy Act, a federal statute, and there is even less justification for the application of a State procedural rule in this action than in a diversity of citizenship case.

It is submitted that the State law cannot bind the federal court while exercising its power under federal statutes such as the Bankruptcy Act. In this situation the court determines its power to award compensation to a real estate broker for services rendered by the wording of the federal statutes as enacted, and not by any State law. In this case Sections 241, 242 and 243 of the Bankruptcy Act gives the court power to allow reasonable compensation for services rendered in the administration of the estate which are of benefit to the estate. The Bankruptcy Act does not require that a contract to render such services be in writing.

The case of *Berman v. Palmetto Apartments Corporation*, 153 Fed. (2d) 192 (*supra*) is again on point. This case demonstrate that the state Statute of Frauds has no application in a federal court proceedings under the Bankruptcy Act. The State of Michigan, the state in which the federal court was sitting in the *Berman* case, has exactly the same statute of frauds provision as does the State of California in regard to agreements to employ real estate brokers. (Volume 3 Compiled Laws of Michigan, Section 566.132.) In

the *Berman* case sitting in Michigan with this statute of frauds provision the federal court proceeding under the Bankruptcy Act allowed a reasonable compensation to a real estate broker who did not have a written agreement with the Trustee to pay any commission. The same factual situation is present in this case, and the same rules should be applied.

The Trustee in his brief on page 55 cites the case of *Vanston Bondholders Protective Committee v. Green*, 67 S. Ct. 237, 329 U.S. 156 for the proposition that this State law is applicable in bankruptcy proceedings. However, in that case the Court clearly differentiates the type of claim involved in that case from the claim of Appellant in this matter which arises out of the administration of the estate. The Court states at page 169 of U. S. Reports:

“The business of bankruptcy administration is to determine how existing debts can be satisfied out of the bankruptcy estate so as to deal fairly with the various creditors. The existence of a debt between the parties to an alleged creditor-debtor relationship is independent of bankruptcy and precedes it. The parties are in a bankruptcy Court with their rights and duties established, *except insofar as they subsequently arise during the course of bankruptcy administration or as a part of its conduct.* (Emphasis added)”.

The Court thereby clearly distinguishes the claim which it had before it in that case which was an existing debt created under State law, and the claim presented by Appellant in this matter which arises out of the administration of the bankrupt's estate and

which is created by the bankruptcy act itself and controlled by federal law.

The Court makes it equally clear in the *Vanston* case (*supra*) that the State law has absolutely no control over the federal court in its administration of the Bankruptcy Act. The Court at page 162 of U.S. Reports states as follows:

“In determining what claims are allowable and how a debtor’s assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie v. Tompkins*, 304 U.S. 64 has no application. That case decided that a Federal District Court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another State Court. See *Holmberg v. Ambrecht*, 327 U.S. 392. *But Bankruptcy Courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with the authority granted by Congress to determine how and what claims shall be allowed under equitable principles.* (*Heiser v. Woodruff*, 327 U.S. 726, 732; *American Security Co. v. Sampsell*, 327 U.S. 269, 272; *Pepper v. Litton*, 308 U.S. 295, 303-306)”.

This is exactly in accord with Appellant’s contention and in accord with the action of the federal court in the *Berman* case (*supra*). In the *Berman* case the claim of the real estate broker for reasonable compensation for services rendered was allowed in spite of the fact that the State of Michigan has exactly the same Statute of Fraud provision as does the State of California.

There is no requirement in the Bankruptcy Act that the claim of a real estate broker for reasonable compensation for services rendered the bankrupt estate be based upon a written contract authorizing him to proceed. The wording of the applicable sections makes no such requirement, and the federal court has not interpreted these sections of the Bankruptcy Act as requiring any written memorandum upon which to base a claim. The contention of the Trustee in attempting to make California law applicable to this claim, and in attempting to read a requirement of a written contract into the applicable provisions of the bankruptcy act cannot be sustained.

Even if the California statute was applicable in this proceeding, Appellant submits that the Trustee is estopped to raise such a defense in view of the conduct of the Trustee and the debtor corporation in the payment of a real estate broker's commission to the Appellant for the sale of certain cutting contracts to Mr. Nielson under an identical situation. Appellant was paid a real estate broker's commission in that situation without prior authorization and without any written agreement. This conduct raises an estoppel to rely on the Statute of Fraud. (*Seymour v. Oelrichs*, 156 Cal. 782; *LeBlond v. Wolfe*, 83 Cal. App. (2d) 282—defendant estopped to rely on the Statute of Fraud where real estate broker has changed his position in reliance on oral promise of the defendant;) (*Karus v. Olney*, 80 Cal. 90, *Fleming v. Dolfin*, 214 Cal. 269; *Brenneman v. Lane*, 87 Cal. App. 414.) Appellant has changed his position and waived a commis-

sion in reliance on the conduct of the Trustee in the Nielson transaction. Trustee should not be allowed now for the first time to raise the Statute of Frauds as a defense after this prior conduct and after the acceptance of the full benefits of the sale procured by petitioner.

It should also be noted that a portion of the assets sold through the efforts of Appellant in this matter to the Sugarman interests were personal property. (Tr. 177.) The Statute of Frauds has no application to the sale of personal property. (*Meadows v. Clark*, 33 Cal. App. (2d) 24.)

In addition Appellant would like to point out to the Court the very recent case of *Palmer v. Wahler*, 133 Cal. App. (2d) 705, 285 Pac. (2d) 8. In that case plaintiff had been orally requested to find a purchaser for certain timber. Plaintiff did procure a buyer who, after some negotiation with the parties, caused a corporation formed by him to purchase the timber. Plaintiff did not handle or participate in the negotiations for the sale after he had found and introduced the buyer to the owner of the timber. Defendant urged that Plaintiff was not entitled to a commission because (1) the oral contract requesting Plaintiff to obtain a purchaser for these assets was invalid under the Statute of Frauds and (2) because Plaintiff failed to allege or prove that he was a duly licensed real estate broker.

The Appellate Court affirmed the Lower Court and held that the oral contract of the parties was a "finder's agreement" which required only that the plain-

tiff introduce a prospective purchaser of the property to the owner desiring to sell in order to entitle the plaintiff to compensation, and that neither the Statute of Frauds nor the real estate licensing acts are applicable to these "finder's agreements." (See also to the same effect *Heyn v. Phillip*, 37 Cal. 529; *Shaffer v. Beinhorn*, 190 Cal. 569, 213 Pac. 960; *McKenna v. Edwards*, 19 Cal. App. (2d) 327, 65 Pac. (2d) 810; *Crofoot v. Spivak*, 113 Cal. App. (2d) 146, 248 Pac. (2d) 45; *Freeman v. Jergins*, 125 Cal. App. (2d) 536, 271 Pac. (2d) 210.)

It is submitted that the request of the Trustee and his agent in this case that Appellant find a purchaser for the assets of this estate constitutes a finder's agreement as defined in these cases, and that this agreement is not within the purview of the California Statute of Frauds.

CONCLUSION.

Appellant has submitted to this Court a claim for compensation as a result of services rendered to the Trustee in a reorganization proceedings. These services were requested by the Trustee, were accepted by the Trustee, and were of great benefit to the bankrupt estate.

This equitable claim was denied in the Lower Court as a result of what Appellant contends to be an erroneous application of the law of quasi contract and the law of volunteers. It is submitted that the facts of this case should induce this Court under the law of quasi

contract and as a matter of justice and equity to impose an obligation on the Trustee to pay for the beneficial services rendered at his request and freely accepted by him. Appellant was not a volunteer in rendering these services because they were rendered at the request of the Trustee in a justifiable belief that Appellant would be paid, and because the services rendered were specialized services of a real estate broker which did not duplicate the services of the Trustee.

The Trustee has attempted to overcome this equitable claim for services on a number of technical grounds all of which have been discussed in the above brief and which have been shown to be inapplicable. These technical considerations should not be allowed to overcome this equitable claim. The Bankruptcy Court is a Court of equity, and its equitable powers should be exercised to see that substantial justice is done. As was stated in the case of *Pepper v. Litton*, 308 U.S. 275:

“The Bankruptcy Courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, and that technical considerations will not prevent substantial justice from being done.”

Appellant therefore submits that the decision of the lower Court should be reversed, that the case should

be decided on its merits, and that Appellant should be awarded reasonable compensation.

Dated, November 11, 1957.

Respectfully submitted,

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